

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review –	)	
Review of the Commission’s Broadcast	)	
Ownership Rules and Other Rules Adopted	)	MB Docket No. 06-121
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
2002 Biennial Regulatory Review – Review	)	
of the Commission’s Broadcast Ownership	)	MB Docket No. 02-277
Rules and Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications Act	)	
of 1996	)	
	)	
Cross-Ownership of Broadcast Stations and	)	MM Docket No. 01-235
Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in	)	
Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

**REPLY COMMENTS OF ION MEDIA NETWORKS**

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## **SUMMARY**

Since its adoption in 1985, the UHF Discount has improved television service nationwide by stimulating the growth of new free, over-the-air broadcast networks. The UHF Discount has served exactly the role the Commission envisioned for it by helping weaker UHF stations band together to compete in an increasingly consolidated media environment. Indeed, the UHF Discount has been so successful that at this point, the UHF Discount is largely responsible for 2 nationwide networks and at least 25% of the primetime broadcast network programming available today.

Modifying or eliminating the UHF Discount would severely damage the public interest by undermining the very stations that the rule was instituted to protect and would eliminate the many benefits the UHF Discount has created. The new and emerging networks that have used the UHF Discount to build their businesses provide vital programming to traditionally underserved viewers and provide the few broadcast outlets for independently produced programming. Indeed, ION is one of the last places in broadcast television where independent programming producers can exhibit their content. The UHF Discount therefore promotes the values of diversity, competition, and local service that underlie the Commission's media ownership rules. Against these benefits, the opponents of the UHF Discount have provided no evidence of harm to any public interest. ION submits that no such harm exists.

The real harm would come if the Commission uses this proceeding to curtail the UHF Discount. Without the UHF Discount, a network like ION could not exist, and the distribution alternative it offers to independent programmers would disappear. At this time of uncertainty for the free, over-the-air television broadcasting industry, a decision to modify or eliminate the UHF Discount would disable new networks and weaken numerous local stations across the country.

To even consider the UHF Discount in this proceeding, the Commission would have to

ignore a clear congressional command. The Consolidated Appropriations Act of 2004 takes the UHF Discount out of the ambit of the Commission's periodic review of ownership restrictions mandated by Section 202(h). The UHF Discount's opponents provide several black-is-white arguments seeking to establish the Commission's authority to consider the UHF Discount here, but the plain language of the statute and the Third Circuit's interpretation of it leave no doubt that the Commission only can consider the UHF Discount in a proceeding that is separate from this Quadrennial Review process.

Even if the Commission had the authority to modify or eliminate the UHF Discount in this proceeding (which it does not), there is no basis for doing so. None of the arguments presented by the UHF Discount's opponents identify a single public interest that would be served by eliminating the rule. Also absent from their argument is any evidence supporting the proposition that the UHF Discount is no longer needed or that the technical and competitive concerns the rule was designed to address have been overcome. Those problems persist because UHF stations remain technically handicapped, and that technical shortcoming has manifested itself in competitive disparities that have not disappeared and that will not disappear in the foreseeable future.

The broadcasting industry currently is engaged in a very difficult transition to DTV. This is precisely the wrong time to change rules in ways that will make that transition even more difficult. It is still very unclear how the DTV transition will impact UHF stations and there is no reason to believe that completing the transition will reduce or eliminate the traditional handicap that UHF stations have endured. The Commission should not assume that the transitions will have this effect, and it should wait until the transition is complete before tinkering with the rules governing UHF station ownership.

Given the overwhelming balance of the public interests and record evidence favoring retention of the UHF Discount, it would make no sense for the Commission to assert its jurisdiction to modify or eliminate the rule against the clear directive of the Consolidated Appropriations Act of 2004. Instead the Commission should dismiss the UHF Discount from this proceeding and, to the extent it deems necessary, should commence a separate proceeding at some future time to address the future of the UHF Discount in the post-DTV transition world.

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**REPLY COMMENTS OF ION MEDIA NETWORKS**

ION Media Networks (“ION”), by its attorneys and pursuant to Section 1.415 of the Commission’s rules, hereby submits these Reply Comments to urge the Commission not to consider changes to the UHF Discount in this proceeding. Congress has barred consideration of the UHF Discount in this proceeding. Even if the Commission had the authority, there is no basis in the record of this or any other proceeding that would support modification or repeal. The Commission should dismiss the UHF Discount from consideration in the current

Quadrennial Review and defer any potential changes to the rule to a future proceeding outside the Section 202(h) periodic review process.

## **BACKGROUND AND INTRODUCTION**

The UHF Discount was designed in 1985 to give UHF stations a fair chance to compete against stronger, more entrenched VHF competitors in local television markets.<sup>1</sup> As consolidation in the television industry has increased, the need for the UHF Discount only has grown. As the Commission has noted, the success of the UHF Discount in fostering fair competition is indisputable: two national, free over-the-air television networks – ION and Univision – have come into being as a result of the flexibility created by the UHF Discount. That means the UHF Discount is responsible for at least 25% of the free, over-the-air network programming available to American television viewers today. The UHF Discount provided the blueprint used by non-network companies like ION and Univision to build independent, over-the-air networks, just as the Commission envisioned.

ION is a prime example of how the UHF Discount has worked to improve diversity, competition, and service to local communities. In addition to offering a family-friendly alternative to typical major network and cable fare, ION is one of the last places where truly independent video content producers can find a home to broadcast their programming to a national audience without major network approval. In the past year, ION has announced a number of new independent programming initiatives, including:

- Partnering with RHI Entertainment (formerly known as Hallmark Entertainment) to provide a four-hour family-friendly programming block during primetime,

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<sup>1</sup> See Multiple Ownership of AM, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 100 F.C.C.2d 74, 92-94 (1985).

Friday-Sunday, evenings beginning July 1, 2007;<sup>2</sup>

- Teaming up with independent programmers Scholastic, Corus Entertainment, Classic Media/Big Idea and others to launch the qubo children's programming network;<sup>3</sup>
- Preparing to launch the 24-hour, health education-themed i-Health Network on one of its digital program streams;<sup>4</sup>
- Airing programming in conjunction with New York City's Tribeca Film Festival.<sup>5</sup>

Each of the independent programmers involved in these projects has found that ION's distribution platform provides a scale and scope that otherwise would be unavailable outside the major networks, large cable MSOs, or broadcast satellite providers.<sup>6</sup>

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<sup>2</sup> See Press Release, ION Media Networks and RHI Entertainment Announce Exclusive Programming Alliance: Synergistic Partnership to Deliver RHI Entertainment's Award-Winning Miniseries and TV Movies to ION's 92-Plus Million U.S. Homes (October 25, 2006) (available at [http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20061025005921&ndmHsc=v2\\*A1134306000000\\*B1165879267000\\*DgroupByDate\\*J2\\*M740\\*N1001503&newsLang=en&beanID=1963892417&viewID=news\\_view](http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20061025005921&ndmHsc=v2*A1134306000000*B1165879267000*DgroupByDate*J2*M740*N1001503&newsLang=en&beanID=1963892417&viewID=news_view)).

<sup>3</sup> See Press Release, Qubo to Launch on NBC, Telemundo and the i network This September; New Children's Programming Venture from ION Media Networks, NBC Universal, Scholastic, Classic Media/Big Idea and Corus Entertainment's Nelvana (August 23, 2006) (available at [http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20060823005610&ndmHsc=v2\\*A1134306000000\\*B1165879579000\\*DgroupByDate\\*J2\\*M740\\*N1001503&newsLang=en&beanID=1963892417&viewID=news\\_view](http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20060823005610&ndmHsc=v2*A1134306000000*B1165879579000*DgroupByDate*J2*M740*N1001503&newsLang=en&beanID=1963892417&viewID=news_view)).

<sup>4</sup> See Press Release, ION Media Networks to Launch New Digital Health Network; Consumer Health Programming Serving Vital Community Needs to Launch on Largest TV Station Group (May 31, 2006) (available at [http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20060531005790&ndmHsc=v2\\*A1134306000000\\*B1165880325000\\*DgroupByDate\\*J2\\*M740\\*N1001503&newsLang=en&beanID=1963892417&viewID=news\\_view](http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20060531005790&ndmHsc=v2*A1134306000000*B1165880325000*DgroupByDate*J2*M740*N1001503&newsLang=en&beanID=1963892417&viewID=news_view)).

<sup>5</sup> See Press Release, ION MEDIA NETWORKS and the Tribeca Film Festival Partner to Showcase "Tribeca Night on i" on National Network Television on Friday, May 5 at 8 p.m. ET/PT (April 25, 2006) (available at [http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20060425005731&ndmHsc=v2\\*A1134306000000\\*B1165880948000\\*DgroupByDate\\*J2\\*M740\\*N1001503&newsLang=en&beanID=1963892417&viewID=news\\_view](http://home.businesswire.com/portal/site/home/index.jsp?epi-content=GENERIC&newsId=20060425005731&ndmHsc=v2*A1134306000000*B1165880948000*DgroupByDate*J2*M740*N1001503&newsLang=en&beanID=1963892417&viewID=news_view)).

<sup>6</sup> Although it does not mention the UHF Discount, the AFL-CIO claims that ION's nationwide network harms programming diversity. Comments of the American Federation of Labor and Congress of Industrial Organizations and the Department of Professional Employees, AFL-CIO



Eliminating the UHF Discount, as some have requested, would cripple UHF broadcasters like ION, and it would eliminate an important option for independent programmers seeking large-scale broadcast distribution free of major network influence. Without the UHF Discount, ION would not and could not continue, and the alternative distribution channel ION provides would cease to exist. The foes of the UHF Discount talk about increasing diversity and curtailing consolidation, but if they are successful, programming diversity will suffer a serious blow with the loss of the independent programming outlet ION is able to offer only by taking advantage of to the UHF Discount.

Discontinuing the UHF Discount also would damage all of the public interests in diversity, competition, and improved local service that are supposed to underlie the ownership rules.<sup>7</sup> The UHF Discount affirmatively increases content and viewpoint diversity, enhances competition, and strengthens localism by creating strong local affiliates. The UHF Discount provides a way for television broadcasters to construct networks that can provide a regional or nationwide challenge to the major networks. Closing this avenue would eliminate existing

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at 60-61. The AFL-CIO's comments, however, are factually inaccurate and marked by a failure to conduct even the most basic investigation. First, the AFL-CIO refers to ION by a variation on the company's former corporate name: "Paxson Television." ION changed its corporate name in 2005, but from the rest of the AFL-CIO's comments, it's clear that organization stopped paying attention long before then. The AFL-CIO's argument that ION reduces diversity revolves around its claim that ION airs repurposed NBC programming, including the *NBC Nightly News*. ION (and PAXNET before it) has not broadcast any repurposed NBC programming for several years. Moreover, NBC and its affiliates are not "in the process of merging station operations" with ION's local stations. No such merger of operations is contemplated by ION or NBC. This is a prime example of a party hostile to changes in the ownership rules providing bad information in an effort to sway the Commission. The AFL-CIO's factual premises are untrue and its conclusions are unsound. ION contributes a great deal to diversity of programming by providing a one-of-a-kind national broadcast platform for independently-produced programming. The Commission can safely ignore the AFL-CIO's comments.

<sup>7</sup> See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13627 ¶ 17 (2003) ("2002 Ownership Order").

competitors to the major broadcast networks and ensure that additional competitors never emerge.

The television broadcasting industry is at a critical and uncertain point given the growth of MVPD penetration, the decline in over-the-air network ratings, and the advent of the DTV transition. ION agrees with Disney that the time may be coming soon when the Commission will need to encourage rather than discourage multiple broadcast station ownership if it wants to maintain the nation's free, over-the-air broadcasting system in the digital age.<sup>8</sup> It is inconceivable that in this environment, the Commission would consider repealing the UHF Discount and thereby sounding the death knell for broadcast networks like ION that are seeking to reinvigorate independent programming and provide leadership during this very difficult transition from analog to free DTV broadcasting.

For these reasons, and the reasons discussed below and in ION's Comments, ION strongly urges the Commission to dismiss the UHF Discount issue from this proceeding and to defer any action modifying or eliminating the UHF Discount until such time in the future as the UHF Discount is clearly no longer needed to ameliorate the technical and competitive handicaps that UHF broadcasters face.

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<sup>8</sup> See Comments of the Walt Disney Company at 2 (filed October 23, 2006).

**I. The Consolidated Appropriations Act of 2004 Does Not Permit Consideration of the UHF Discount in Any Phase of This Proceeding.**

**A. The Plain Meaning of the CAA and the Third Circuit’s Decision in *Prometheus* Foreclose Consideration of the UHF Discount During 202(h) Proceedings.**

Several parties claim that the Commission retains the authority to amend or repeal the UHF Discount in this proceeding.<sup>9</sup> That reading of the CAA<sup>10</sup> is belied by the plain text of the statute, but if that is not enough, the Third Circuit specifically addressed the precise boundaries of the Commission’s authority in *Prometheus Radio Project v. FCC*:

Although **we find that the UHF discount is insulated from this and future periodic review requirements**, we do not intend our decision to foreclose the Commission’s consideration of its regulation defining the UHF discount in a rulemaking **outside the context of Section 202(h)**.<sup>11</sup>

There is no mystery to the court’s holding. The FCC is permitted to examine its authority to alter the UHF Discount, but that examination, and any subsequent changes – if the Commission determines it has the authority to make them – must occur “outside the context of Section 202(h).”<sup>12</sup> It’s hard to imagine how the Third Circuit could have more clearly explained that the Commission is forbidden from examining the UHF Discount in Quadrennial Review proceedings like this one.

Prometheus Radio Project’s (“Prometheus’s”) claim that the Third Circuit’s decision preserves the Commission’s authority to consider the UHF Discount in this proceeding simply

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<sup>9</sup> See Comments of the Network Affiliated Stations Alliance at 2, 3-6 (filed October 23, 2006) (“NASA Comments”); Comments of Capitol Broadcasting Company, Inc. at 6 (filed October 23, 2006) (“CBC Comments”); Comments of Prometheus Radio Project at 3-6 (filed October 23, 2006) (“Prometheus Comments”); Comments of David E. Griffith at 10-11 (filed October 23, 2006).

<sup>10</sup> See *Consolidated Appropriations Act, 2004*, H.R. 2673, 108th Cong. § 629 (2004) (“CAA”).

<sup>11</sup> 373 F.3d 372, 397 (3d Cir. 2004) (emphasis added) (“*Prometheus Radio Project*”).

<sup>12</sup> *Id.*

ignores what the Third Circuit actually said and substitutes its own view of the desirable outcome for the language of the statute. Prometheus argues that the court's recognition that the Commission sought comment on its continuing authority under Section 202(h),<sup>13</sup> amounts to a holding that the Commission can consider the UHF Discount in future Quadrennial reviews.<sup>14</sup> As shown above, however, there is no basis for interpreting the Third Circuit's decision in this way because the court explicitly stated just the opposite: the Commission *cannot* consider the UHF Discount in a Section 202(h) proceeding, but it may examine its authority in another proceeding. The plain language of the Third Circuit's decision shuts the door on Prometheus's argument.

Capitol Broadcasting Company, Inc. ("CBC") acknowledges that the Commission cannot alter the UHF Discount in a Section 202(h) proceeding, but it nonetheless asks the Commission to act on its Petition for Reconsideration of the *2002 Ownership Order*.<sup>15</sup> The Commission must recognize, however, that the CAA's prohibition on considering the UHF Discount as part of a Section 202(h) proceeding includes both its remand of the *2002 Ownership Order* and the 2006 Quadrennial review. Therefore, the issues raised in CBC's Petition for Reconsideration can only be considered in a separate proceeding that addresses UHF Discount issues.

Even if the Commission could consider CBC's old arguments against the UHF Discount, ION has explained at length why none of those arguments could justify repeal or modification of the UHF Discount.<sup>16</sup> In particular, like all other opponents of the rule, CBC never has provided

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<sup>13</sup> *See id.*

<sup>14</sup> *See* Prometheus Comments at 4-5.

<sup>15</sup> *See* CBC Comments at 6-7.

<sup>16</sup> *Compare* Petition for Reconsideration of Capitol Broadcasting Company, Inc., MB Docket No. 02-277, filed September 4, 2003 *with* Opposition to Petitions for Reconsideration of Paxson Communications Corporation, MB Docket No. 02-277, filed October 6, 2003.

any evidence that the UHF Discount fails to serve the public interests identified in the 2002 *Ownership Order* or that the UHF Discount causes harm to any identifiable public interest.

**B. The Commission Cannot Take Any Action that Would Disturb Station Combinations in Place When the CAA Was Enacted**

The Court in *Prometheus* also found that Congress intended to enact a precise 39 percent national audience cap that incorporated the UHF Discount.<sup>17</sup> Congress specified that cap to ensure that all existing station combinations would comply with the ownership limit and so that no divestitures would be required.<sup>18</sup> Consequently, all future Commission action on the UHF Discount must be consistent with Congress's intent that existing station combinations be permitted to continue intact.<sup>19</sup> This means that the Commission should treat as moot its decision to sunset the UHF Discount for network owned and operated stations.<sup>20</sup> Instead, the decision about what to do about major network owned and operated stations should be considered as part of any separate rulemaking that the Commission undertakes to determine how UHF stations should be treated in the DTV world.

Prometheus's argument that the Commission should abolish the UHF Discount and require immediate divestiture of all stations over the national cap within two years flies in the

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<sup>17</sup> See *Prometheus Radio Project*, 372 F.3d at 396.

<sup>18</sup> See 150 Cong. Rec. S18 (daily ed. Jan. 20, 2004) (statement of Senator Kohl); 150 Cong. Rec. S78 (daily ed. Jan. 21, 2004) (statement of Senator Byrd); 150 Cong. Rec. S83 (daily ed. Jan. 21, 2004) (statement of Senator Durbin); 150 Cong. Rec. S86 (daily ed. Jan. 21, 2004) (statement of Sen. McCain). As these legislators noted, several station owners' national audience reach was near the 39% limit. The fact that these Senators opposed both the bill and its result only underscores Congress's intent that existing combinations would be preserved.

<sup>19</sup> See Comments of Univision Communications, Inc. at 4-6 (filed October 23, 2006).

<sup>20</sup> See 2002 *Ownership Order*, 18 FCC Rcd at 13847 ¶ 591; NASA briefly claims that the Commission intended to sunset the UHF Discount for all network-owned stations, regardless of whether the station actually broadcasts network programming. NASA Comments at 8; see also, NASA Comments, MB Docket No. 02-277, at 2 & n.2 (filed March 24, 2004). As ION has explained in the past, it is clear from the context of the *Order* that the Commission was referring only to stations that are owned and operated by one of the major networks.

face of Congress and the Third Circuit.<sup>21</sup> The Commission undertook a thorough review of the UHF Discount just two years ago and determined that there was more than sufficient evidence to retain the rule. Then Congress passed the 39% cap, instructing the Commission to continue using the UHF Discount to determine compliance with the cap, and deliberately choosing a threshold that would preserve all existing station combinations. To eliminate any doubt, the Third Circuit authoritatively construed the CAA to require the Commission to continue using the UHF Discount. Prometheus claims that there is “no valid basis for any UHF Discount,” but in fact, the UHF Discount is supported by all the record evidence the Commission has seen; by an act of Congress, and by the Third Circuit Court of Appeals.<sup>22</sup> There is simply no basis in law or fact for the divestitures that Prometheus calls for, and its suggestion should be rejected without further consideration.

Even NASA, which is generally hostile to the UHF Discount, recognizes that requiring divestitures would be inappropriate.<sup>23</sup> NASA’s call for grandfathering existing station combinations and eliminating the UHF Discount for network-owned stations in the digital world is premature. Without question, if the Commission at some point determines that the UHF Discount will be eliminated for any stations, existing combinations should be grandfathered with full transferability. At this point, however, the Commission has not yet determined the future of the UHF Discount, and it cannot do so in this proceeding. Grandfathering will be an essential topic for consideration if and when the Commission commences a separate rulemaking to consider the future of the UHF Discount in the DTV world. Until it makes such a determination

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<sup>21</sup> See Prometheus Comments at 6-9.

<sup>22</sup> See *id.* at 9.

<sup>23</sup> See NASA Comments at 5, 6. NASA takes no position on the UHF Discount for non-major network stations. NASA Comments at 2 & n.2.

based on a sound record of evidence, the Commission cannot require divestiture or take any action that would require the dissolution of the station combinations Congress sought to protect through enactment of the CAA.

## **II. No Evidence Before the Commission Supports Any Modification of the UHF Discount at This Time.**

Prometheus, Capitol, and NASA each call for repeal or substantial diminishment of the UHF Discount, but none of them provide even the slightest evidence the UHF Discount is no longer needed or that any public benefit would be realized from the Commission's re-regulation of UHF broadcasters. Instead of providing evidence in favor of repeal, each of the UHF Discount's opponents merely repeats arguments that the Commission already has considered and properly rejected. Thus, even if the Commission had the statutory authority to reconsider the UHF Discount in this proceeding (which it does not), the record would compel the Commission to again uphold the rule.

### **A. MVPD Penetration Does Not Justify Diminishment of the UHF Discount.**

Prometheus claims that if the Commission retains the UHF Discount, it should reduce it to a 10% discount to reflect its assertion that MVPD penetration is approaching 90%, and that the UHF stations are not handicapped where they have cable carriage.<sup>24</sup> The Commission has been rejecting this argument since 1998, when opponents of the rule first claimed that MVPD penetration had ameliorated the need for the UHF Discount. Prometheus's claim that the UHF Discount should be no more than the percentage of nationwide non-MVPD households is a relatively new spin on that old argument. Of course, novelty does not make an argument good, and in this case, Prometheus's argument is very bad.

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<sup>24</sup> See Prometheus Comments at 9.

The UHF Discount addresses competition in the *broadcast industry* and accounts for differences among *broadcast* stations. The rule is primarily concerned with ensuring that *broadcast* service is maintained, particularly from UHF stations that might otherwise have only marginal business prospects. For that reason the Commission must remain focused on the millions of households that do not subscribe to an MVPD and the many more millions of unwired televisions in households that do.<sup>25</sup> Eliminating the UHF Discount threatens service to these viewers, a fact that the Commission has recognized but that Prometheus entirely ignores. For that reason alone, Univision is correct that the Commission's consideration of MVPD penetration in the context of the UHF Discount should be minimal.<sup>26</sup>

In any case, the Commission has never said that the UHF Discount should mirror nationwide MVPD penetration, and there is no logical reason that it should. The Commission has recognized that the signal strength handicap of UHF stations makes it less likely that stations will be able to secure DMA-wide cable carriage.<sup>27</sup> Reducing the UHF Discount based on national MVPD penetration numbers, as Prometheus suggests, would completely ignore the circumstances in local markets where stations are unable to gain cable carriage on all cable systems in the DMA. The UHF Discount accounts for a number of competitive handicaps that are difficult to quantify with precision. The idea that it should be tied solely to MVPD penetration is meritless.

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<sup>25</sup> See *2002 Ownership Order*, 18 FCC Rcd 13845-46 ¶¶ 587-88.

<sup>26</sup> See Univision Comments at 9.

<sup>27</sup> See *2002 Ownership Order*, 18 FCC Rcd at 13845-46 ¶ 587.



The Commission has consistently rejected the notion that the growth of MVPD penetration has eliminated the need for the UHF Discount.<sup>28</sup> Prometheus's argument is just old wine in new wineskins and should be rejected as such.

**B. There Is No Evidence that the Digital Transition Will Eliminate the Technical or Competitive Reasons for the UHF Discount.**

Both Prometheus and NASA also continue to assert that the transition to DTV will eliminate any need for the UHF Discount.<sup>29</sup> That proposition, however, is far from proven, and neither party offers any additional evidence that this will be the case. The effect of the DTV transition on the UHF Discount is a matter that deserves far greater study, and the Commission should tackle that issue in a separate proceeding between now and the end of the transition.

The Commission did indicate in the *2002 Ownership Order* that the DTV transition would "substantially equalize" UHF and VHF signals.<sup>30</sup> That conclusion, however, was not (and is not today) well-supported by the evidence before the Commission. Indeed, ION provided a great deal of evidence that directly contradicted this conclusion.<sup>31</sup> The facts are that the signals of DTV UHF stations will be weaker and less robust than their DTV VHF counterparts, and DTV UHF stations will be more expensive to operate than DTV VHF stations.<sup>32</sup> Although stations have been permitted to maximize their DTV facilities, maximization was in many cases limited by the Commission's decision to allot DTV channels based on replication of current

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<sup>28</sup> See 1998 Biennial Regulatory Review, *Biennial Review Report*, 15 FCC Rcd 11058, 11072-74 (2000) ("2000 Ownership Order"); *2002 Ownership Order*, 18 FCC Rcd at 13845-47.

<sup>29</sup> See NASA Comments at 2, 5-6; Prometheus Comments at 8-9.

<sup>30</sup> 18 FCC Rcd at 13847 ¶ 591.

<sup>31</sup> See Letter from John R. Feore, Jr., to Marlene H. Dortch, MB Docket No. 02-277 (filed May 16, 2003).

<sup>32</sup> See Reply Comments of Paxson Communications Corporation, MB Docket No. 02-277 at 11-12 (filed February 3, 2003).

service area.<sup>33</sup> Moreover, until analog shut-off and commencement by all stations of full-power DTV broadcasting, the Commission cannot be sure that all of the maximized facilities, which have been approved to expand stations' coverage areas, will actually be able to coexist in the real world.<sup>34</sup> Unexpected instances of DTV interference are well-documented, and the Commission would be unwise to presume that the transition to universal full-power DTV will cause no interference problems.<sup>35</sup> Regardless of whether we are discussing analog or digital television signals, UHF signals always are and always will be more susceptible to interference than VHF signals.<sup>36</sup> The record therefore shows that UHF stations will remain substantially inferior to VHF stations after the transition is complete.

Moreover, as Univision correctly points out, the technical inferiority of UHF stations will only be exacerbated by the DTV transition due to the notorious "cliff effect" and the inability of UHF stations to overcome terrain obstacles.<sup>37</sup> For all these reasons, the Commission's apparent conclusion in the *2002 Ownership Order* that the technical reasons for the UHF Discount may disappear with the DTV transition was not well-advised. The Commission should revisit this issue in an appropriate proceeding outside the context of the periodic review context.

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<sup>33</sup> See *id.* at 4-5, Attachment 1. See also Comments of Paxson Communications Corporation, MB Docket No. 02-277 at 18-19 (filed January 2, 2003).

<sup>34</sup> See Letter from John R. Feore, Jr., to Marlene H. Dortch, MB Docket No. 02-277 at 3 (filed May 7, 2003).

<sup>35</sup> See *id.*

<sup>36</sup> See *2002 Ownership Order*, 18 FCC Rcd at 13845 ¶ 586; *2000 Ownership Order*, 15 FCC Rcd 11078 ¶ 35.

<sup>37</sup> Univision Comments at 12 & n.21.

**C. Opponents of the UHF Discount Do Not Even Address the Competitive Basis for the UHF Discount.**

Parties opposing the UHF Discount completely ignore the record evidence demonstrating that UHF stations have labored under a handicap that after many years has led to a clear competitive disparity. The Commission recognized that disparity in the *2002 Ownership Order* and it alone provides a more than sufficient basis for continuing the UHF Discount.<sup>38</sup> Moreover, neither the Commission nor any party has explained how this competitive disparity will be wiped out by the transition to DTV. The more intuitive and reasonable conclusion would be that the disparity will not end and that UHF stations will face the same competitive disadvantage in the digital world as they currently face.

Fox is most likely correct that the appropriate course for ensuring that UHF stations remain viable and competitive is to continue applying the UHF Discount in the DTV world to all stations that benefit from it in the analog world.<sup>39</sup> If the DTV transition does ameliorate the competitive disparities that have grown up over so many years, it will not do so immediately, so the UHF Discount will probably need to remain in place for these stations for some time into the future. Here again, however, these are ideas that are only appropriately considered in a separate proceeding. If the Commission does attempt to deal with them here, the evidence in the record leaves the Commission no choice but to announce that the UHF Discount will remain in place, at least for those stations currently benefiting from it, for the foreseeable future. There is simply no evidence to support any contrary conclusion.

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<sup>38</sup> See *2002 Ownership Order*, 18 FCC Rcd at 13845 ¶ 585, 13846 ¶ 588, 13847 ¶ 590.

<sup>39</sup> See Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. at 33-34 (filed October 23, 2006).

### **III. The Overwhelming Evidence that Led the Commission To Retain the UHF Discount in the 2002 Ownership Order Remains Unchanged and Unchallenged.**

While the opponents of the UHF Discount have again failed to provide any evidence that the UHF Discount should be abolished, Univision's comments provides an excellent summation of the evidence that favors retaining the rule.<sup>40</sup> It is easy to lose sight of just how lopsided the case favoring the UHF Discount is. Near the close of the 2002 Biennial rulemaking, ION submitted three filings that included all the evidence that had been submitted in that proceeding that favored the UHF Discount and all that evidence that favored eliminating it.<sup>41</sup> The evidence in favor of the rule ran to more than 100 pages and included ratings studies, cost estimates for construction and operation of UHF and VHF facilities, comparisons of signal coverage area and population for UHF and VHF stations in both analog and digital settings, and evidence that the UHF Discount stimulated the emergence and growth of new over-the-air television networks.<sup>42</sup> The contrary evidence consisted of less than 15 pages of anecdotal evidence that a few UHF stations do not suffer from the UHF handicap and horror stories about potential station combinations. There was simply no comparison between the evidence favoring the UHF Discount and that opposing it. The Commission rightly chose to retain the rule.

The Comments of the parties opposing the UHF Discount in this proceeding have not reversed this remarkable disparity in the quantity and quality of the available evidence. ION has

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<sup>40</sup> See Univision Comments at 6-17. See also ION Comments at 7-8.

<sup>41</sup> See Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277 (filed May 30, 2003) (attached as Exhibit 1); Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277 (filed May 23, 2003) (attached as Exhibit 2); Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277 (filed May 16, 2003) (included in Exhibit 2); Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277 (filed May 7, 2003) (included in Exhibit 2).

<sup>42</sup> See *id.*

attached hereto its previous submissions, which remain uncontradicted in the record.<sup>43</sup> Congress has forbidden the Commission from considering the UHF Discount in this proceeding, but if it elects to do so, the evidence demands retention until the Commission or an interested party provides evidence that the rule is no longer necessary to foster the numerous public interests that it has served until now. At this point, no such evidence has been provided.

## **CONCLUSION**

The Commission is under intense pressure to “do something” about media consolidation. Curtailing the UHF Discount should not be that something. Since its inception in 1985, the UHF Discount has served numerous public interests while damaging none. The new networks that have emerged utilizing the UHF Discount serve important minority and other traditionally underserved viewers. They also provide an important outlet for independent program producers that otherwise would have no choice to reach a broadcast audience other than the major networks, which tend to favor their own internally-produced programming. Eliminating the UHF Discount would destroy these new networks without providing any corresponding public benefit.

The Commission is without authority to review the UHF Discount in this proceeding, but even if it had the authority, there is no factual basis for modifying or eliminating the rule. The parties opposing the UHF Discount in this proceeding have produced no evidence that would provide a basis for any Commission action other than retaining the UHF Discount in its current form. The Commission should dismiss the UHF Discount issue from this proceeding and, to the

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<sup>43</sup> See Attachment 1.

extent it deems necessary, should commence a separate proceeding to address the future of the UHF Discount in the post-DTV transition world.

Respectfully submitted,

**ION MEDIA NETWORKS**

\_\_\_\_\_  
/s/

John R. Feore, Jr.

Jason E. Rademacher

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January 16, 2007

# ATTACHMENT 1

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May 30, 2003

VIA HAND DELIVERY

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Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

MAY 30 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: *Ex Parte* Presentation  
MB Docket No. 02-277;  
MM Docket Nos. 01-235, 96-197, 01-317 and 00-244

Dear Ms. Dortch:

Paxson Communications Corporation ("PCC"), by its attorneys, and pursuant to Section 1.1206 of the Commission's rules, hereby submits this written *ex parte* presentation in response to inquiries from the Commission staff and to aid the Commission in its review of the UHF Discount as part of its omnibus 2002 Biennial Review of its broadcast ownership rules. Through Comments, Reply Comments and several *ex parte* presentations, PCC has demonstrated the continuing need for the UHF Discount so long as analog broadcasting continues and has provided significant evidence that the need for the UHF Discount will persist even after the end of the DTV transition. To further cement a record that already overwhelmingly supports retention of the UHF Discount, PCC hereby submits the attached study: "The 'UHF Penalty' Still Exists: Update of the 1998 NAB Study," performed by Richard V. Ducey, Ph.D, Executive Vice President, Strategic Consulting at BIA Financial Network (the "Ducey Study"). This study demonstrates again that the UHF Discount remains an important and needed facet of the Commission's television broadcast ownership regulations.

The Ducey Study adds yet another piece of concrete evidence that UHF stations continue to operate with a significant audience-reach handicap and that they will continue to do so for the foreseeable future. The study compares the ratings of UHF and VHF stations and then accounts for differentials due to network affiliation and market-size. A similar study originally was performed by Stephen E. Everett, Ph.D., using November 1997 Nielsen numbers and was submitted by the National Association of Broadcasters in the 1998 Biennial Review.<sup>1</sup> For this proceeding, Dr. Ducey has replicated the 1998 study using November 2002 Nielsen ratings

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<sup>1</sup> See Comments of the National Association of Broadcasters, MM Docket No. 98-35, filed July 21, 1998, at Appendix C.



figures. The 1998 study showed that, on average UHF stations generate only about 65.3% of the audience generated by VHF stations. The Ducey Study shows that by 2002, that percentage had fallen to 63.4%. When the numbers are broken down by network, the Ducey Study shows that network UHF stations consistently underperform network owned VHF stations. For example, FOX UHF stations generate an audience that is nearly 34% smaller than that of FOX VHF stations. These differentials actually slightly exceed those demonstrated by the 1998 study, indicating that the UHF handicap may be becoming more pronounced, not less.

The study conclusively shows that UHF stations suffer smaller audiences when compared to their VHF competitors, and it is particularly persuasive because, by comparing network-affiliated VHF stations to their network-affiliated UHF counterparts, it shows that differences in programming cannot be the driver of UHF stations' lower audience ratings. Moreover, like the 1998 study, the Ducey Study also eliminates market size as a potential cause of the UHF Penalty. As the study shows, the only variable that can account for the audience differential between UHF and VHF stations is the simple fact that some stations are fortunate to have VHF channel allotments, while others continue to labor under a UHF handicap that the Commission has repeatedly and correctly recognized.

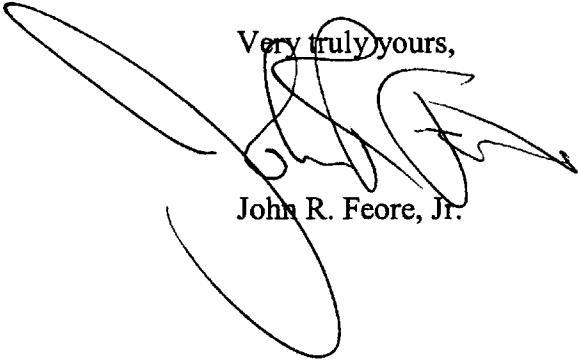
It has become fashionable over the past few weeks to opine that the UHF Discount makes the current 35% national TV ownership cap into a 70% cap. While this misunderstanding is unsurprising when mouthed by people who are unfamiliar with the mechanics of broadcasting, it is both misleading and disingenuous when it comes from broadcasters like Capitol Broadcasting Company who obviously know better. Indeed, as the Ducey Study shows, UHF stations are not nearly as effective at reaching viewers in their DMAs as their VHF counterparts. Far from correcting this chimerical "70% cap," eliminating the UHF Discount would be the equivalent of imposing on UHF broadcasters a lower national audience reach cap than that faced by their VHF competitors. As the Ducey Study shows, retaining the UHF Discount not only makes sense from this practical competitive standpoint, it also provides a needed corrective measurement for UHF stations' limited audience reach.

Given the audience-reach superiority of VHF broadcasters demonstrated by the Ducey Study, there can be no excuse or justification for eliminating the UHF Discount. As the Commission knows, the UHF/VHF disparity has and continues to cause competitive distortions in local television markets across the country. One way to help correct these imbalances is through maintaining the UHF Discount and thereby allowing and encouraging group ownership on a scale – such as that achieved by PCC and Univision – that makes the UHF handicap more manageable. From a policy perspective, given these significant competitive handicaps faced by UHF broadcasters, eliminating the UHF Discount would be perverse. More importantly,

Marlene H. Dortch, Esquire  
May 30, 2003  
Page 3

engaging in this re-regulation of UHF broadcasters would be contrary to all the evidence before the Commission, and would therefore be contrary to law.

Very truly yours,



John R. Feore, Jr.

JRF/gt  
Enclosure  
cc(w/encl): Mr. Kenneth Ferree  
Mr. Paul Gallant



network

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## **The “UHF Penalty” Still Exists: Update to 1998 NAB Study**

**May 30, 2003**

**Prepared by**

**Richard V. Ducey, Ph.D.**

**Executive Vice President, Strategic Consulting**

**BIA Financial Network**

# **The “UHF Penalty” Still Exists: Update to 1998 NAB Study**

**May 30, 2003**

## **Introduction**

The National Association of Broadcasters conducted an investigation of November 1997 primetime ratings on VHF and UHF affiliates of the ABC, CBS, NBC and FOX networks to assess whether there were systematic differences in viewing levels.<sup>1</sup> This 1998 NAB study found that even after accounting for other factors beyond whether an affiliate was VHF or UHF, including the station’s network and DMA rank, a consistent difference between these types of stations persisted. This VHF versus UHF difference always manifested itself as a lower primetime rating for the UHF station. This is the “UHF Penalty.”

The question pursued in this study is whether the UHF Penalty still exists. To replicate the NAB study as closely as possible the same type of data (primetime viewing) for the same primetime ratings period (November) and the same type of analysis (Analysis of Variance or ANOVA) were used. Ratings data for viewers 12 years or old were obtained from Nielsen Media Research for the November 2002 primetime viewing period.

## **Method**

The specific research questions investigated were:

1. After controlling for possible intervening factors, such as network programming line-up and market size, do UHF affiliates generate lower primetime ratings than do VHF affiliates, on average?
2. Are VHF/UHF ratings differences in any way related to network affiliation or market size?

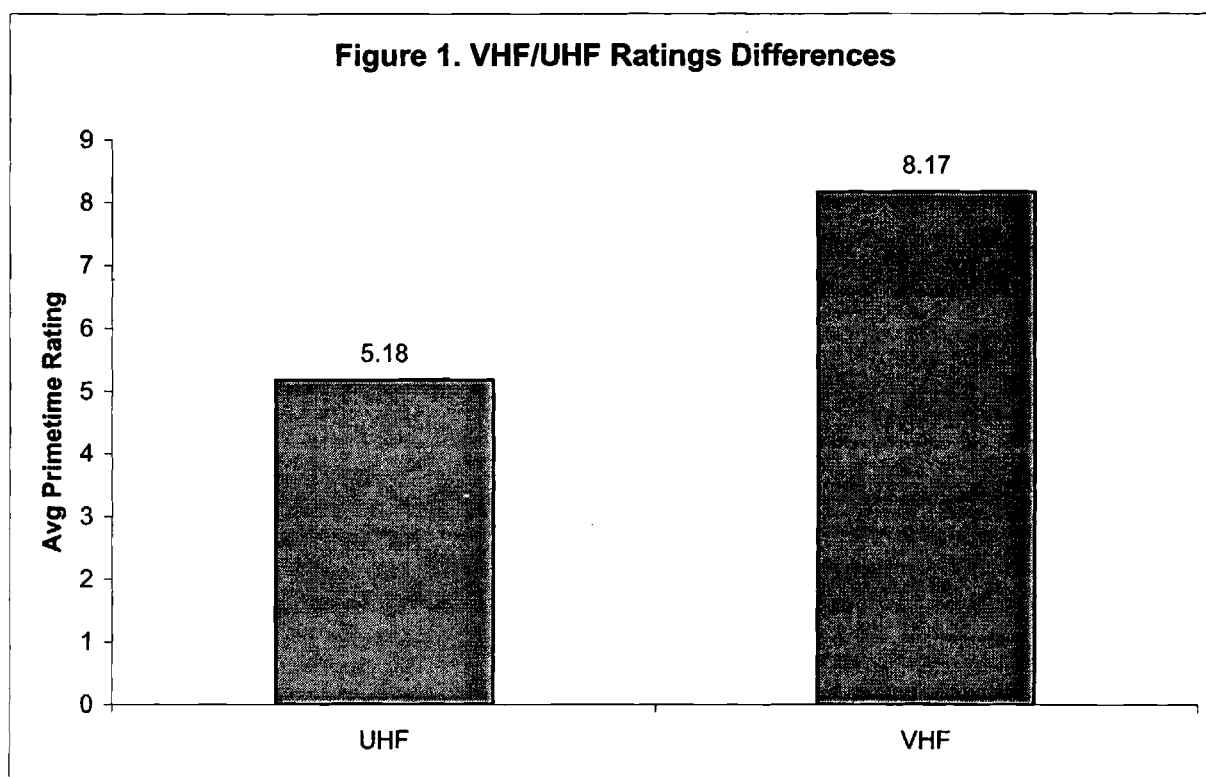
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<sup>1</sup> Everett, Stephen E., *The “UHF Penalty” Demonstrated*, Washington, DC: National Association of Broadcasters, July 1998.

## Results<sup>2</sup>

### *VHF Affiliates Still Draw Higher Ratings*

The 1998 NAB study found that the average primetime rating for VHF network affiliate stations in November 1997 was 9.8 while for UHF affiliates it was 6.4 or a "penalty" of -3.4 ratings points for UHF stations. Five years later, as demonstrated in Figure 1, this handicap still exists. In November 2002, VHF affiliates had an average primetime rating of 8.2 versus 5.2 for UHF affiliates.<sup>3</sup>



Source: BIAfn analysis of Nielsen Media primetime ratings data for 12+ viewers, November 2002.

<sup>2</sup> All ANOVA main effects terms described in these results are significant at or beyond the 0.05 level.

<sup>3</sup> As with the 1998 NAB study, the average ratings shown represent the unweighted mean of affiliates of all DMAs (one average rating per affiliate in each DMA). Therefore, as with the NAB study, large and small markets have equal influence upon the national averages depicted here.

### The Relative "UHF Penalty" Has Increased

Table 1 provides a comparison of the "UHF Penalty" in November 1997 versus November 2002 in terms of how much smaller the average UHF primetime rating is versus the comparable VHF rating. In the 1998 NAB Study, the average UHF primetime rating was about 34.7% smaller. By 2002, the average UHF primetime rating was 36.6% smaller.

**Table 1. Relative UHF Penalty**

	<b>1997</b>	<b>2002</b>
<b>UHF</b>	6.4	5.18
<b>VHF</b>	9.8	8.17
<b>Diff</b>	-3.4	-2.99
<b>% Diff</b>	-34.69%	-36.60%

### "UHF Penalty" Worse for Some Networks

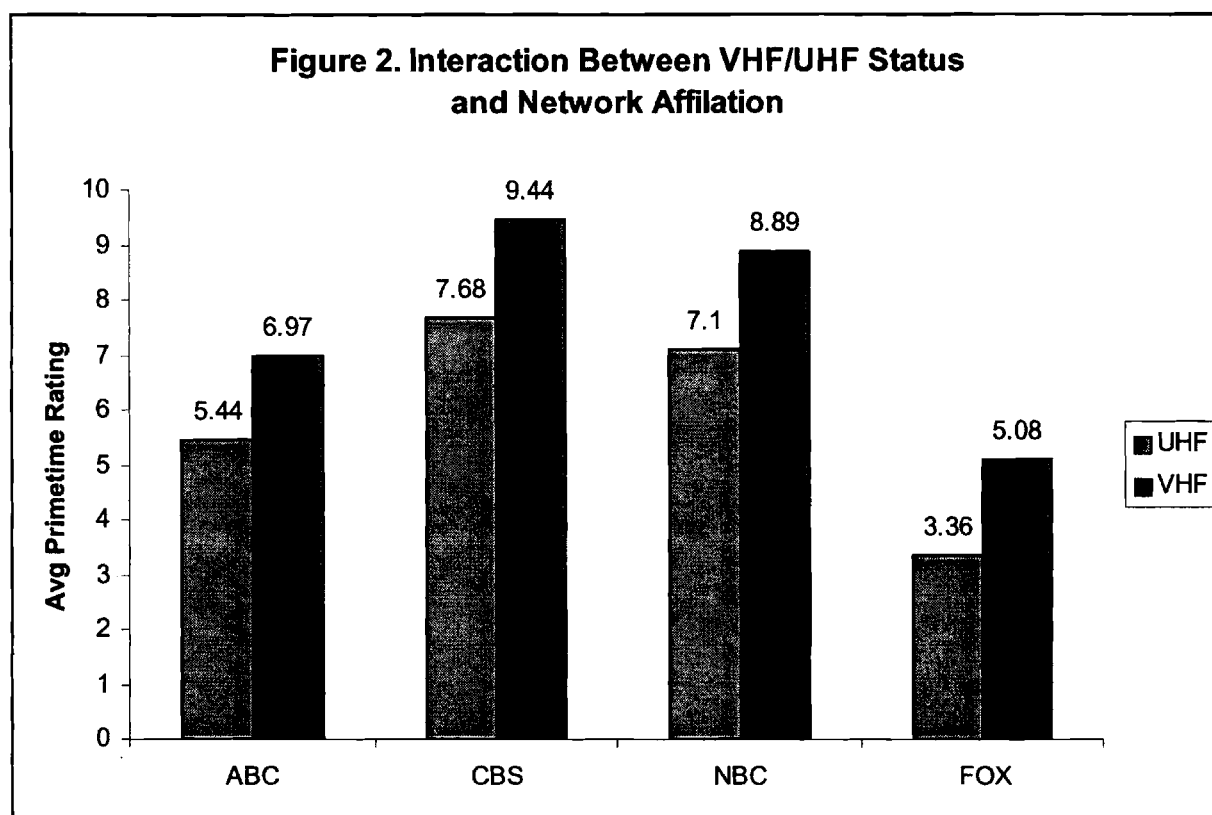
As demonstrated in Table 2, all UHF affiliates deliver smaller primetime ratings than their VHF counterparts. In terms of differences between average rating points, this effect is smallest for ABC affiliates where UHF affiliates deliver an average primetime rating of 1.53 points less than their VHF counterparts. In terms of relative differences, FOX UHF affiliates suffer a 1.72 rating point difference. This equates to a viewing audience almost 34% smaller on the average FOX UHF versus VHF affiliate.

**Table 2. UHF/VHF Differences by Network**

<b>Station Type</b>	<b>UHF</b>	<b>VHF</b>	<b>Rating Point Difference</b>	<b>Relative % Difference</b>
<b>ABC</b>	5.44	6.97	-1.53	-21.95%
<b>CBS</b>	7.68	9.44	-1.76	-18.64%
<b>NBC</b>	7.10	8.89	-1.79	-20.13%
<b>FOX</b>	3.36	5.08	-1.72	-33.86%

Source: BIAfn analysis of Nielsen Media primetime ratings data for 12+ viewers, November 2002.

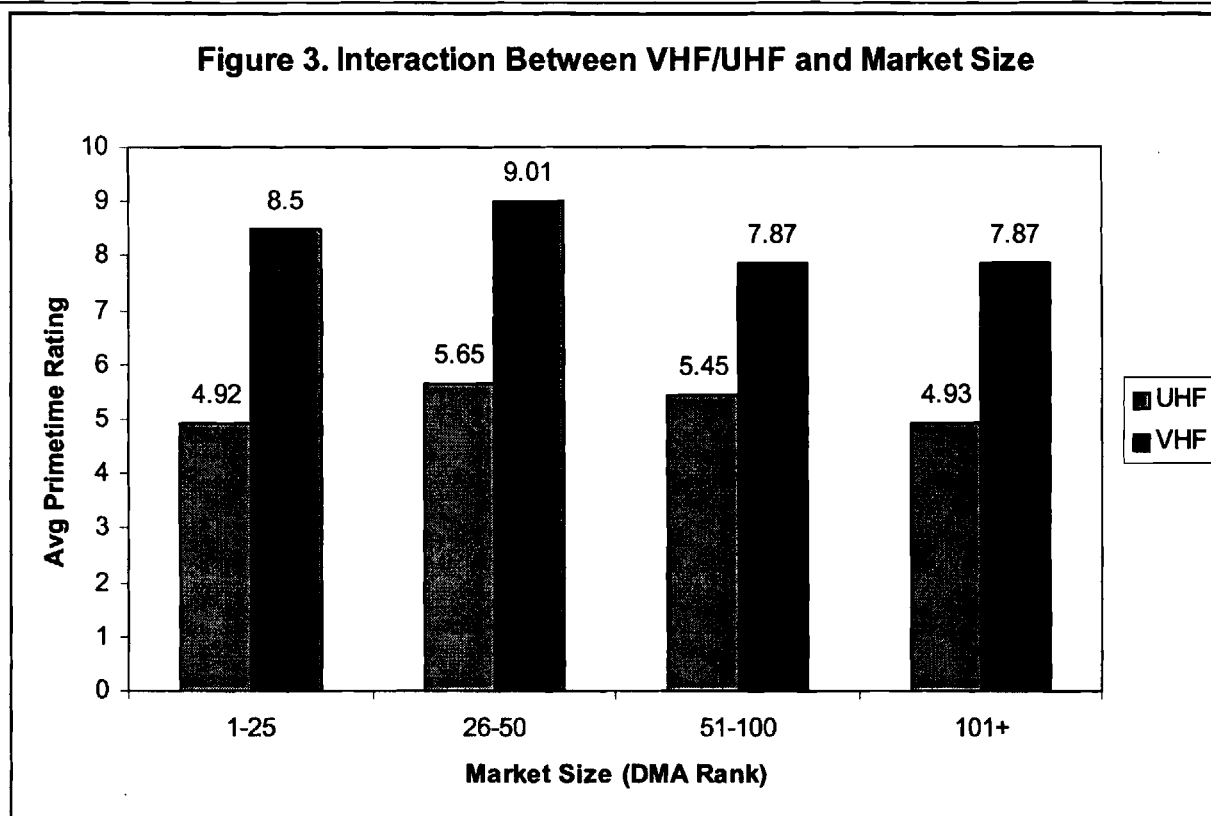
Figure 2 presents a graphic view of these data. Again, we note that these data are based on unweighted averages (see footnote 2) and so the average primetime ratings indicated here may not match those commonly reported by the networks and others.



Source: BIAfn analysis of Nielsen Media primetime ratings data for 12+ viewers, November 2002.

### **"UHF Penalty" Across All Market Sizes**

Figure 3 clearly illustrates that the "UHF Penalty" phenomenon persists across all market sizes. This handicap is largest in both absolute (average rating point difference) and relative (percentage difference) measures for UHF affiliates in the top 25 markets.



### Conclusion

The NAB's July 1998 study documented the existence of a so-called "UHF Penalty" which was defined to mean that even after controlling for market size and affiliation type, UHF affiliates of the four major networks exhibit a clear and statistically significant (at the 0.05 level) handicap of generating lower audience ratings in primetime.

This study replicated and updated the NAB analysis of November 1997 data with comparable data from the November 2002 period to determine whether this penalty still exists. The findings are the same – there is a "UHF Penalty" and this penalty continues to exist across market sizes and affiliation types.



# ATTACHMENT 2

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May 23, 2003

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Marlene H. Dortch, Esquire  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

MAY 23 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Notification of Ex Parte Communication  
MB Docket No. 02-277;  
MM Docket Nos. 01-235, 96-197, 01-317 and 00-244

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on May 22, 2003, M. Anne Swanson and I met with Jordan Goldstein, Senior Legal Advisor to Commissioner Michael J. Copps to discuss Paxson Communications Corporation's opposition to any modification or elimination of the UHF Discount as part of the FCC's omnibus biennial review of its broadcast ownership rules. During this meeting, the undersigned outlined the following four principal reasons for retaining the UHF Discount:

1. **The UHF Discount makes it possible to construct new over-the-air broadcast networks that serve niche markets that are underserved by the major networks.** Paxson and Univision have shown that this strategy can work, and have increased the diversity of both over-the-air and cable programming.
2. **The UHF Discount provides a reasonable approximation of the audience-reach handicap that UHF broadcasters face.** The Commission has repeatedly acknowledged the technical inferiority of over-the-air UHF stations. Although cable carriage may boost some stations' coverage above 50%, UHF stations still are unable to reach as many cable headends as their VHF counterparts, meaning that their overall service populations will be smaller. There is no evidence in the record supporting any number other than 50%, and there is no evidence to suggest that a more accurate number exists.

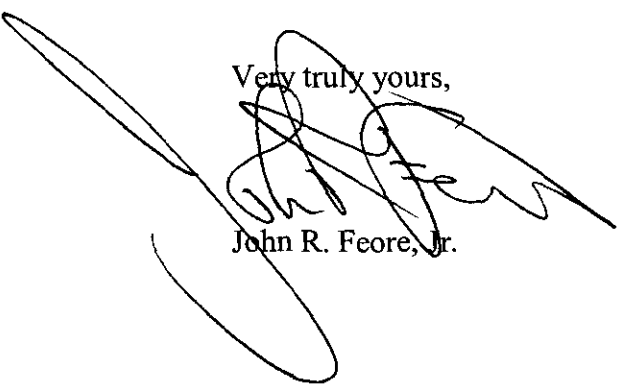
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3. **The UHF Discount helps to account for other financial handicaps faced by UHF broadcasters, creating a more level competitive playing field for competing UHF and VHF stations.** These additional financial handicaps include the greater expense of building and operating analog UHF stations and the lower ratings and consequent ad revenues garnered by UHF stations. By allowing owners that hold UHF stations to realize the economies of scale group ownership provides, the UHF Discount reduces these handicaps and allows UHF broadcasters to compete more effectively with their primarily VHF competitors.
4. **Parties were entitled to rely on the Commission's June 2000 decision affirming the UHF Discount until the end of the DTV transition.** The Commission has received no evidence undermining its June 2000 conclusion that would justify frustrating parties' rightful and understandable reliance on that decision.

In addition, the undersigned provided Mr. Goldstein with the attached filings of Paxson Communications Corporation urging the retention of the UHF Discount and copies of the attached filings of Capitol Broadcasting Company urging the elimination of the UHF Discount and asked that Commissioner Copps consider the overwhelming quality and quantity of the record evidence favoring retention of the UHF Discount as opposed to the unsubstantiated conclusory assertions urging elimination of the Discount. The undersigned also cited the FCC's Ninth Annual Report in MB Docket No. 02-145 to show that cable penetration has, in fact, declined since the Commission's June 2000 Biennial Decision.

As required by Section 1.1206(b) of the FCC's rules, two copies of this letter and attachments are being submitted for each of the above-referenced dockets.

Very truly yours,



John R. Feore, Jr.

JRF/mwh  
Attachment

cc (w/o encl.): Jordan Goldstein, Esq.

EX PARTE OR LATE FILED

**UHF DISCOUNT**

**RECORD SUBMISSIONS**

**OF**

**PAXSON COMMUNICATIONS  
CORPORATION**

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May 16, 2003

RECEIVED

MAY 16 2003

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation  
Supplement to the Record Concerning Retention of the UHF Discount  
Biennial Review of Broadcast Ownership Regulations  
MB Docket No. 02-277

Dear Ms. Dortch:

Paxson Communications Corporation ("PCC"), by its attorneys, and pursuant to Section 1.1206 of the Commission's rules,<sup>1</sup> hereby submits this written *ex parte* presentation to aid the Commission in resolving questions that have arisen over the past several weeks with respect to retention of the UHF Discount. PCC has argued extensively through Comments, Reply Comments, and its May 7, 2003, written *ex parte* presentation that there is not a shred of evidence in the record of this proceeding that would support modification or elimination of the UHF Discount. PCC also made this fact clear to members of the House Energy and Commerce Committee through the attached letter submitted May 8, 2003.<sup>2</sup> Nonetheless, PCC has learned that questions have arisen on Capitol Hill regarding whether circumstances have changed sufficiently to warrant altering or eliminating the UHF Discount and whether empirical evidence supports retention of the current rule. PCC believes that the record provides unequivocal answers to both questions – ample evidence conclusively demonstrates that circumstances have not changed sufficiently to justify alteration or elimination of the UHF Discount. This letter should lay to rest any lingering doubts about retaining the UHF Discount so long as analog broadcasting continues and should serve as a departure point for the future debate about whether the rule will be appropriate in the DTV era.

**The Realities of UHF Broadcasting Continue To Demand the UHF Discount**

The competitive handicaps inherent in UHF broadcasting continue to justify the UHF Discount. Despite changes in the broadcast television marketplace since the adoption of the UHF Discount in 1985, the Commission properly recognized in June 2000 that competitive

<sup>1</sup> 47 C.F.R. § 1.1206.

<sup>2</sup> See Attachment 1.

conditions then continued to support the rule.<sup>3</sup> The changes in UHF broadcasters' position cited by opponents of the UHF Discount, *i.e.* the advent of analog TV must-carry and the increase in viewers receiving television service by cable and satellite MVPDs, had largely taken shape by June 2000 and have changed little over the past three years. As the Commission found, these changes do not eliminate the need for the UHF Discount. That finding remains as true today as it was three years ago. In both the current and most recent Biennial Reviews, PCC, along with NAB, Granite Broadcasting, and Univision have submitted substantial evidence demonstrating that:

- UHF stations continue to be more expensive to construct and operate than VHF stations;<sup>4</sup>
- UHF signals continue to be technically inferior to VHF signals;<sup>5</sup>
- UHF signals continue to be unable to reach over-the-air audiences comparable to those of VHF stations;<sup>6</sup>
- UHF stations still do not gain cable carriage comparable to VHF stations;<sup>7</sup>
- UHF stations still do not receive ratings as high as those of VHF stations;<sup>8</sup>
- and consequently, UHF stations still are not as financially successful as their VHF competitors.<sup>9</sup>

---

<sup>3</sup> See 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058, 11078 ("1998 Biennial Review").

<sup>4</sup> See Attachment 2 (originally submitted as Exhibit A to Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998.). See also, *e.g.*, Univision Comments at 4; Paxson Comments at 17-18; Paxson Reply Comments at 8; Supplement to the Record Concerning Retention of the UHF Discount, MB Docket No. 02-277, filed May 7, 2003, Attachment C at 5-8 ("UHF *Ex Parte*"). Accord, 1998 Biennial Review, 15 FCC Rcd 11078.

<sup>5</sup> See Univision Reply Comments at 3; Granite Comments at 6; Paxson Comments at 15-16. See also 1998 Biennial Review, 15 FCC Rcd 11078-79.

<sup>6</sup> See Paxson Comments at 17; Univision Reply Comments at 3-4.

<sup>7</sup> See Granite Comments at 6; Univision Reply Comments at 8-9; Paxson Comments at 16-17. See also 1998 Biennial Review, 15 FCC Rcd 11078.

<sup>8</sup> See UHF *Ex Parte*, Attachment A (originally included as Appendices C to Comments of the National Association of Broadcasters, MM Docket No. 98-35, filed July 21, 1998).

<sup>9</sup> See UHF *Ex Parte*, Attachments A-B (originally included as Appendices C to Comments of the National Association of Broadcasters, MM Docket No. 98-35, filed July 21, 1998).

Neither cable carriage nor increased MVPD subscribership have or can effectively remedy these handicaps. Indeed, as PCC has shown, cable carriage only codifies UHF broadcasters' limited signal reach because carriage is guaranteed only on cable systems to which a good quality signal is delivered. The alternative – providing additional technical support to distant cable head-ends – only imposes additional costs on already financially burdened UHF stations. These real-world facts formed the basis for the Commission's decision in the 1998 *Biennial Review*,<sup>10</sup> and, as Granite demonstrated in its Reply Comments, none of these facts have changed.<sup>11</sup> The Commission consequently has no evidentiary basis for altering its well-reasoned earlier decision.

Far from justifying abandonment of the UHF Discount, the growth in MVPD penetration and subscribership actually supports continuation of the Discount because that growth has placed the free-over-the-air American broadcasting system at risk. Many marginal UHF stations are only likely to survive by utilizing the economies of scale made possible by group ownership. Particularly during the resource-draining DTV transition, removing a support mechanism like the UHF Discount would be unwise, and could lead to a reduction in broadcast television service to vulnerable small and mid-sized communities. Although the overall range of media choices the average American consumer can access has increased over the past 20 years, broadcast television remains the cheapest, most reliable, and most easily accessible local information source. The diminution of service likely to result from alteration or elimination of the UHF Discount would therefore have a significant negative impact on localism and diversity in communities around the country. Accordingly, now more than ever, the UHF Discount is a necessary part of the Commission's broadcast ownership regulations.

#### **Ample Empirical Evidence Supports the UHF Discount**

Questions also have been raised regarding the extent to which the empirical evidence in the Commission's record in this Biennial Review demonstrates the continuing necessity of the UHF Discount. In an *ex parte* filing on May 7, 2003, PCC detailed for the Commission the extensive evidentiary record that supports continuation of the UHF Discount.<sup>12</sup> PCC cited evidence from both the current and 1998 Biennial Review proceedings including:

- evidence from Granite that UHF broadcasters' circumstances have not changed appreciably since the UHF Discount was upheld in June 2000;
- evidence from Univision and Paxson demonstrating that the UHF Discount enables broadcasters to economically reach underserved markets by developing new competitive networks serving, for example, minority communities and viewers interested in family-values and faith-based programming;

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<sup>10</sup> See 1998 *Biennial*, 15 FCC Red 11078-79.

<sup>11</sup> See Granite Reply Comments at 5-6.

<sup>12</sup> See Supplement to the Record Concerning Retention of the Uhf Discount, MB Docket No. 02-277, filed May 7, 2003.

- evidence from Univision and Paxson that UHF broadcasters are experiencing new interference from DTV stations, further handicapping their ability to serve their communities; and
- evidence from NAB demonstrating the technical and financial handicaps inherent in UHF broadcasting.

Paxson also submits with this letter a chart illustrating facts the Commission already has found -- that the greater expense of building and operating analog UHF stations is a substantial handicap for broadcasters.<sup>13</sup> These pieces of evidence, among others, conclusively show that the UHF Discount remains necessary in the analog world.

In addition, PCC has submitted evidence to the House Energy and Commerce Committee that demonstrates that the current competitive disparities between analog UHF and VHF stations are likely to persist even after the DTV transition is complete. Power level comparisons between PCC's UHF stations and their VHF competitors show that -- consistent with the Commission's policy of allowing current stations to replicate their service areas -- the VHF stations have, in many cases, been granted considerably higher power than the Paxson UHF stations.<sup>14</sup>

In many markets, these power disparities lead to population coverage disparities that translate directly into lower revenues. Attachment 3 to this letter shows the DTV population disparity of several PCC DTV stations as compared to their current analog VHF competitors' DTV stations. These population figures represent PCC's maximized facilities, so Attachment 3 already reflects the full extent to which the Commission's DTV maximization policies will allow these stations to equalize their DTV competitive position with respect to these competitors. In some cases, the difference in population coverage is particularly stark. For example, WGPX-DT, PCC's station in the Greensboro-High Point-Winston Salem DMA, reaches less than 36% of the viewers reached by WFMY-DT, one of PCC's VHF competitors in that market. The Commission must keep in mind that the future population coverage disparities described by Attachment 3 will be in addition to the other legacy handicaps that former analog UHF broadcasters will carry forward into the DTV era, such as a history of lower viewer ratings, non-network affiliation, and financial underperformance. Thus, to declare at this point that maximization has made UHF stations the equal of their current analog VHF competitors would be contrary to what the Commission already knows. Given the many uncertainties regarding stations' actual future DTV operations, the evidence before the Commission clearly compels delay in deciding whether to retain the UHF Discount after the DTV transition is complete.

Thus, considerable evidence shows not only the ongoing need for the UHF Discount in the current analog world, but also the potential that the need will carry over to the digital world as well. This only serves to confirm the wisdom of the Commission's stated intention to

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<sup>13</sup> See Attachment 2.

<sup>14</sup> See Attachment 1.



reconsider the UHF Discount only once the transition is far enough along to provide an accurate picture of the public interest in the DTV world.<sup>15</sup>

### **Loosening the National Ownership Cap Does not Justify Altering the UHF Discount**

PCC also understands that concerns have arisen as to whether maintaining the UHF Discount is logically consistent with loosening the national ownership cap. Given the different aims and effects of these two rules, such a course would not only be intellectually consistent but a sound policy approach. The national ownership cap is meant to foster a diversity of voices in every local market by limiting the number of markets any one broadcaster can reach. The UHF Discount, on the other hand, is designed to ensure that no broadcaster is credited with reaching a substantial number of viewers that it does not, in fact, reach. In that respect, the UHF Discount acts as a corrective measure, rationalizing the limitations placed on broadcasters by the national ownership cap, and is fundamentally deregulatory in nature. The 1996 Telecommunications Act instituted the Biennial Ownership Review process to determine whether the national ownership cap remains "necessary in the public interest." This inquiry has no bearing, however, on whether a corrective rule like the UHF Discount remains necessary to ensure that broadcasters that own UHF stations are not unfairly handicapped in reaching as many viewers as they are permitted by law. As PCC has shown, due to the continuing technical and financial handicaps borne by UHF broadcasters, the 50% discount remains a reasonable approximation of the number of viewers actually reached by UHF broadcasters regardless of the programming or ownership diversity of the other voices in each media market.

Indeed, by ensuring the economic viability of UHF broadcasting, the UHF Discount ensures added diversity in local markets. As described in the record before the FCC, Univision has been able to take advantage of the economies of scale offered by the UHF Discount to offer Spanish-language programming across the country. PCC utilized the same strategy to create PAXTV, the nation's seventh broadcast network, which offers family-values and faith-based programming to an often overlooked and underserved market. Given its stunning record of encouraging new and diverse programming in local television programming markets, and the hard facts regarding UHF broadcasting's continuing technical and financial handicaps, it is hard to understand why the UHF Discount has come under such searching review at this time. Accordingly, the Commission should reject the facile argument that loosening of the national ownership cap somehow justifies an elimination of the UHF Discount.

### **Conclusion**

There can be no doubt about what the evidence in this proceeding demands: **all the evidence before the Commission** supports retention of the UHF Discount for as long as analog broadcasting remains the chief television broadcasting format. Moreover, retaining the UHF Discount would serve every Commission policy that the Discount implicates. The time for debating the retention of the rule in the DTV era is not yet ripe, but already substantial evidence exists to indicate that the rule will remain necessary even after the DTV transition. In any case,

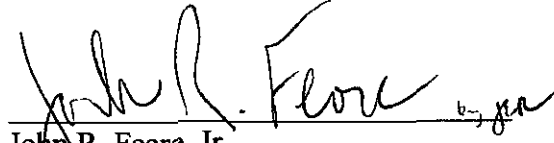
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<sup>15</sup> See 1998 Biennial Review, 15 FCC Red 11079.

Marlene H. Dorch, Esq.  
May 16, 2003  
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no relevant circumstances facing UHF broadcasters have changed since the Commission last upheld the UHF Discount just three years ago. Accordingly, retention of the rule remains necessary in the public interest, and the Commission should reject all invitations to convert this Biennial Review into a vehicle for re-regulating UHF broadcasters without justification.

Respectfully Submitted,



John R. Feore, Jr.  
Counsel for Paxson Communications Corporation

Attachments

cc w/ attachments:

Chairman Michael K. Powell  
Commissioner Kathleen Q. Abernathy  
Commissioner Kevin J. Martin  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
W. Kenneth Ferree, Chief, Media Bureau  
Paul Gallant, Special Advisor, Media Ownership Working Group

Marlene H. Dorch, Esq.  
May 16, 2003  
Page 10

bcc: w/ attachments:

Lowell W. Paxson  
William L. Watson

Marlene H. Dorch, Esq.  
May 16, 2003  
Page 11

bbcc w/attachments:

Jason E. Rademacher  
Susan E. Anderson

# **ATTACHMENT 1**



May 8, 2003

The Honorable John D. Dingell  
United States House of Representatives  
Washington, DC 20515

Re: Retention of the UHF Discount

Dear Congressman Dingell:

I am writing on a matter of critical importance to Paxson Communications Corporation ("PCC") and other UHF television broadcasters throughout the country. I understand that you may push in Congress and at the FCC for repeal of the UHF Discount. With respect, it is my firm belief that the UHF Discount remains absolutely essential to enable UHF broadcasters in a given market to compete on a relatively even footing with their VHF counterparts. Again, with respect, I submit that all of the factual evidence--as opposed to just three conclusory pleadings and a single *ex parte* filing--presented to the FCC on this matter in the current *Biennial Review of Broadcast Ownership Regulations* (MB Docket No. 02-277) illustrate the continuing need for the UHF Discount. As you consider this issue, I would ask that you bear the following facts in mind.

The UHF Discount Is Essential For Existing Analog Stations

Less than three years ago, in its *1998 Biennial Review*, the FCC concluded that the UHF Discount remained "necessary in the public interest" to equalize the competitive positions of UHF and VHF broadcasters. This conclusion was premised on two key findings: first, that inherent and insurmountable technical limitations prevent UHF stations from reaching as great a number of over-the-air viewers and cable headends with a quality signal as VHF stations; and, second, that higher operating expenses for UHF stations place them at a competitive disadvantage. Nothing has occurred in the three years since that conclusion to diminish the need for the UHF Discount. In fact, proponents of the UHF Discount, including PCC, Univision, Granite Broadcasting ("Granite"), and the National Association of Broadcasters ("NAB"), have presented ample evidence to the FCC demonstrating the need to retain the UHF Discount.

Univision, for example, provided significant evidence that the UHF Discount helps it to reach minority households in many of its markets, which tend to have low cable subscribership. PCC and Univision also provided evidence that the activation of new DTV stations is creating additional interference to analog UHF stations with the accompanying loss of service. This plainly refutes any suggestion that the DTV transition itself is ameliorating the competitive disparity between VHF and UHF stations or that eliminating the UHF Discount prior to the close

of the DTV transition would be prudent policy. Factual evidence presented to the FCC by the NAB and PCC in the last two *Biennial Review* proceedings continue to conclusively demonstrate:

- that UHF signals are technically inferior to VHF signals;
- that UHF signals are unable to reach over-the-air audiences comparable to those of VHF stations;
- that UHF stations do not gain cable carriage comparable to VHF stations;
- that UHF stations do not receive ratings as high as those of VHF stations;
- and that consequently, UHF stations are not as financially successful as their VHF competitors;

The fact is that in the analog world, UHF stations simply do not have the ability to reach anything approaching every household in their DMAs, even when cable carriage is considered. For example, in some cases PCC stations cover as little as 27% of the area covered by VHF stations in the same market. Because cable carriage is based on a station's ability to deliver a quality signal to a sometimes distant headend, it is not surprising that UHF stations would be unable to garner the same level of cable carriage as their VHF counterparts. These types of disparities continue to exist and, with the additional DTV-generated interference noted by Univision and PCC, will only be made worse as additional DTV stations commence full power operations.

Therefore, counting each UHF station as reaching only 50% of the households in its DMA allows station-group operators like PCC and Univision to use the UHF Discount to acquire and operate stations that otherwise might fail, enabling them to serve niche audiences that are frankly underserved by the Big Four networks. Rather than seeking ways to curtail UHF broadcasting by eliminating the Discount, I urge you to seek ways to encourage this type of service to the public.

#### The UHF Discount Will Continue To Be Needed In The Digital World

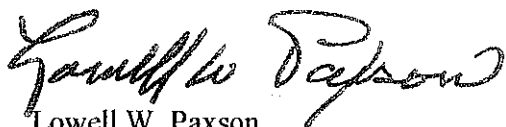
While completion of the DTV transition might make it appropriate to then review the UHF Discount, it is clear that the DTV transition has not progressed sufficiently to make that critical decision at this time because there simply is no record on which to be certain that the UHF Discount will not be needed in the post-transition world. As described above, what is certain is that the transition itself is harming analog UHF broadcasters' ability to serve their viewers, and that such harm is only likely to increase as the transition progresses. Accordingly, eliminating the UHF Discount now based on the possibility of future obsolescence would be a grave error based on unsubstantiated speculation.

The Honorable John D. Dingell  
May 8, 2003  
Page 3

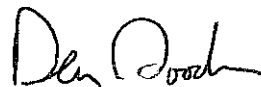
Although the FCC properly has noted that UHF broadcasters' ability to maximize their service area could be an equalizer between UHF and VHF stations, its decision to base the initial DTV Table of Allotments on a principle of replication of service has locked in the signal-coverage disparities of the analog world. For example, in the Detroit market, PCC station WPXD-DT has a pending construction permit application requesting 110 kW ERP, while Fox affiliate WJBK-DT is authorized at 1000 kW. Likewise, in the Washington, D.C. area, PCC station WPXW-DT is licensed at a power of 90 kW, while Fox affiliate WTTG-DT is authorized at 1000 kW. As a consequence, PCC reaches 30% fewer Washington area viewers – or nearly 1,000,000 fewer people – than WTTG-DT. I have attached a chart summarizing these and other disparities faced by PCC UHF stations. With these types of disparities in the digital world, a continued discount will be required if the Congress and the FCC wish to maintain the integrity of the over-the-air broadcast system.

Finally, I firmly believe that eliminating the UHF Discount would be flatly inconsistent with all known facts about UHF broadcasting. It is beyond question that UHF stations already are currently disadvantaged as compared to their VHF counterparts, and the digital system being implemented perpetuates this disadvantage. I simply do not see how it could possibly be necessary in the public interest to eliminate a rule that injures no one and contributes so much to the level of competition in the American broadcasting system.

Sincerely yours,



Lowell W. Paxson  
Chairman & CEO  
Paxson Communications Corporation



Dean M. Goodman  
President & COO  
Paxson Communications Corporation

Attachment



**SELECTED AUTHORIZED DTV POWER LEVELS IN PAXSON  
MARKETS**

<b>MARKET (DMA RANK)</b>	<b>PAXSON STATION</b>	<b>DTV ERP (as authorized in CP) (kW)</b>	<b>COMPETING ANALOG VHF STATION</b>	<b>DTV ERP (most recently authorized facilities) (kW)</b>	<b>PAXSON POWER AS A PERCENTAGE OF COMPETITORS (%)</b>
Houston, TX (11)	KPXB-DT	9.5	KPRC-DT (NBC)	1000	1.0
			KTRK-DT (ABC)	797	1.2
			KHOU-DT (CBS)	759	1.3
Portland, OR (23)	KPXG-DT	16 (pending application)	KGW-DT (NBC)	1000	1.6
			KOIN-DT (CBS)	839	1.9
			KPTV-DT (IND)	741	2.2
Hartford-New Haven, CT (27)	WHPX-DT	90	WFSB-DT (CBS)	1000	9.0
Washington, DC (8)	WPXW-DT	90	WTTG-DT (FOX)	1000	9.0
			WJLA-DT (ABC)	1000	9.0
			WRC-DT (NBC)	813	11.1
			WUSA-DT (CBS)	646	13.9
Greensboro-High Point - Winston Salem, NC (46)	WGPX-DT	95	WFMY-DT (CBS)	1000	9.5
			WGHP-DT (FOX)	1000	9.5
			WXII-DT (NBC)	815	11.7
Detroit, MI (10)	WPXD-DT	110 (pending application)	WJBK-DT (FOX)	1000	11.0
			WDIV-DT (NBC)	773	14.2
			WXYZ-DT (ABC)	770	14.3

# **SELECTED AUTHORIZED DTV POWER LEVELS IN PAXSON MARKETS**

<b>MARKET (DMA RANK)</b>	<b>PAXSON STATION</b>	<b>DTV ERP (as authorized in CP) (kW)</b>	<b>COMPETING ANALOG VHF STATION</b>	<b>DTV ERP (most recently authorized facilities) (kW)</b>	<b>PAXSON POWER AS A PERCENTAGE OF COMPETITORS (%)</b>
Indianapolis, IN (25)	WIPX-DT	165	WTHR-DT (NBC)	1000	16.5
			WTTV-DT (IND)	1000	16.5
			WRTV-DT (ABC)	898	18.4
Seattle-Tacoma, WA (12)	KWPX-DT	175	KING-DT (NBC)	960	18.2
			KSTW-DT (IND)	850	20.6
			KOMO-DT (ABC)	810	21.6
			KVOS-DT (IND)	612.2	28.6
			KIRO-DT (CBS)	603	29.0
			KCPQ-DT (FOX)	600	29.2
Oklahoma City, OK (45)	KOPX-DT	200	KFOR-DT (CBS)	790	25.3
Miami-Ft. Lauderdale, FL (17)	WPXM-DT	200	WFOR-DT (CBS)	1000	20.0
Phoenix, AZ (16)	KPPX-DT	200	KTVK-DT (IND)	1000	20.0
Providence, RI - New Bedford, MA (49)	WPXQ-DT	200 (pending application)	WJAR-DT (NBC)	974	21.5
Grand Rapids, MI (38)	WZPX-DT	212	WZZM-DT (ABC)	1000	21.2
Birmingham, AL (40)	WPXH-DT	225	WBRC-DT (FOX)	1000	22.5
Honolulu, HI (72)	KPXO-DT	297	KHON-DT (FOX)	1000	29.7
			KITV-DT (ABC)	1000	29.7

**SELECTED AUTHORIZED DTV POWER LEVELS IN PAXSON  
MARKETS**

<b>MARKET (DMA RANK)</b>	<b>PAXSON STATION</b>	<b>DTV ERP (as authorized in CP) (kW)</b>	<b>COMPETING ANALOG VHF STATION</b>	<b>DTV ERP (most recently authorized facilities) (kW)</b>	<b>PAXSON POWER AS A PERCENTAGE OF COMPETITORS (%)</b>
Tampa-St. Petersburg, FL (13)	WXPX-DT	210	WTSP-DT (CBS)	625	33.6
Philadelphia, PA (4)	WPPX-DT	200	WCAU-DT (NBC)	560	35.7
Chicago, IL (3)	WCPX-DT	200	WGN-DT (IND)	475	42.1
Cedar Rapids- Waterloo & Dubuque, IA (89)	KPXR-DT	500	KCRG-DT (ABC)	1000	50.0

## **ATTACHMENT 2**

# **UHF/VHF -- COMPARATIVE EQUIPMENT AND ELECTRICITY COSTS\***

Low VHF (Ch. 2 - 6)	100 KW	40 KW	35%	114 KW	\$ 69,905	\$ 400,000	\$250,000
High VHF (Ch. 7 - 13)	316 KW	60 KW	35%	171 KW	\$104,857	\$ 700,000	\$400,000
<b>UHF</b>	<b>5,000 KW</b>	<b>240 KW</b>	<b>55%</b>	<b>437 KW</b>	<b>\$267,968</b>	<b>\$1,250,000</b>	<b>\$750,000</b>

<sup>1/</sup> Information provided by Comark.

# **ATTACHMENT 3**

**SELECTED AUTHORIZED DTV POWER LEVELS IN PAXSON  
MARKETS**

<b>MARKET (DMA RANK)</b>	<b>PAXSON STATION</b>	<b>COMPETING ANALOG VHF STATION</b>	<b>COMPETING POPULATION</b>	<b>PAXSON POPULATION</b>	<b>PAXSON POPULATION AS A PERCENTAGE OF COMPETITORS (%)</b>
Greensboro- High Point- Winston Salem, NC (46)	WGPX-DT	WFMY-DT (CBS)	4,744,000	1,693,000	35.7
Providence, RI - New Bedford, MA (49)	WPXQ-DT	WJAR-DT (NBC)	6,218,000	3,227,000	51.9
Hartford-New Haven, CT (27)	WHPX-DT	WTNH-DT (ABC)	5,875,000	3,204,000	54.5
Raleigh-Durham (Fayetteville), NC (29)	WRPX-DT	WRAL-DT (CBS)	3,468,000	2,079,000	59.9
Albany, NY (57)	WYPX-DT	WRGB-DT (CBS)	1,304,000	928,000	71.2
Washington, DC (8)	WPXW- DT	WUSA-DT (CBS)	7,437,000	5,319,000	71.5
Cedar Rapids- Waterloo & Dubuque, IA (89)	KPXR-DT	KCRG-DT (ABC)	1,108,000	803,000	72.5
Knoxville, TN (62)	WPXK-DT	WBIR-DT (NBC)	1,171,000	916,000	78.2

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May 7, 2003

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MAY - 7 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Washington, DC 20554

Re: Supplement to the Record Concerning Retention of the UHF Discount  
Biennial Review of Broadcast Ownership Regulations  
MB Docket No. 02-277

Dear Ms. Dortch:

Paxson Communications Corporation ("PCC"), by its attorneys, and pursuant to Section 1.1206 of the Commission's rules, hereby submits this written *ex parte* presentation to aid the Commission in its review of the UHF Discount as part of its omnibus *2002 Biennial Review* of its broadcast ownership rules.<sup>1</sup> PCC wishes to take this opportunity to emphasize that there is not a shred of evidence in the record that would support modification or repeal of the UHF Discount. Indeed, all the evidence currently before the Commission illustrates the continuing need for the UHF Discount. The Commission affirmed the UHF Discount in June, 2000, pursuant to a comprehensive record, and any action to repeal or modify the rule without clear, compelling, and substantial evidence would be arbitrary and capricious. Moreover, the wholesale re-regulation of UHF broadcasters would be inconsistent with the Commission's responsibility under Section 202(h) to eliminate burdensome regulations that disserve competition and the public interest. Accordingly, the Commission must reaffirm that the UHF Discount remains necessary for the remainder of the DTV transition and possibly beyond.

**No Evidence in This Proceeding Supports Modification or Repeal of the UHF Discount.**

Less than three years ago, in its *1998 Biennial Review*, the Commission found that the UHF Discount remains "necessary in the public interest" to equalize the competitive positions of

<sup>1</sup> See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 17 FCC Rcd 18503 (2002) (the "*2002 Biennial Review*").



UHF and VHF broadcasters.<sup>2</sup> The Commission based this conclusion on two important findings: first, that insurmountable technical limitations prevent UHF stations from reaching as great a number of over-the-air viewers and cable headends with a quality signal; and, second, that higher operating expenses for UHF stations place them at a competitive disadvantage.<sup>3</sup>

The three commenters in this proceeding that have questioned the continuing validity of the UHF Discount have presented no evidence that undermines either the Commission's findings or its conclusion. Instead, they offer only conclusory statements that the UHF Discount should be eliminated. A consortium of children's groups, for example, states that the Commission "should eliminate the UHF Discount, which overcompensates UHF station owners,"<sup>4</sup> but provides no evidence or explanation to support its contention. Similarly, Westwind Communications, LCC states in its Reply Comments that the Commission should eliminate the "anachronistic" UHF Discount without disclosing how a rule reaffirmed by the Commission less than three years ago became outdated so quickly.<sup>5</sup> The only party to offer more than a sentence against retention of the UHF Discount – the United Church of Christ – offers only past Commission pronouncements regarding the slight amelioration of the UHF handicap.<sup>6</sup> As PCC explained in its Reply Comments, these statements were before the Commission when it most recently retained the UHF and cannot form the basis for repealing it now.

These three comments together with a recent ex parte filing provide the entire record in favor of repealing or modifying the UHF Discount that has been developed in this proceeding and cannot support any Commission action, let alone the repeal of a rule that was so recently reaffirmed. Indeed, without substantial evidence of significantly changed circumstances over the past three years, it would be difficult to produce the reasoned explanation that a reviewing court would require for modification of the UHF Discount at this time.<sup>7</sup> Given its record defending its ownership decisions in court, the Commission must be wary of making sweeping changes without sufficient record evidence to support its decisions. That is particularly the case where, as here, important public benefits continue to flow from the UHF Discount.

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<sup>2</sup>1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058, 11078 ("1998 Biennial Review").

<sup>3</sup> See *id.*

<sup>4</sup> Comments of Children Now, *et al* at 3.

<sup>5</sup> Reply Comments of Westwind Communications, LLC at 3

<sup>6</sup> See Comments of the Office of Communications, Inc. of the United Church of Christ, *et al* at 56-58.

<sup>7</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending two-year old rule without reasoned explanation).

**The Commission Has Received Substantial Evidence that the UHF Discount Remains Necessary in the Public Interest.**

At the same time, proponents of the UHF Discount, including PCC, Univision, Granite Broadcasting ("Granite"), and the National Association of Broadcasters ("NAB"), have presented ample evidence in favor of retaining the UHF Discount. In a recent *ex parte* filing, Capitol Broadcasting Company, Inc. ("Capitol") complains that there has been insufficient discussion of the UHF Discount.<sup>8</sup> To the contrary, there has been considerable discussion of the UHF Discount – but nearly all of it indicates that the UHF Discount must be retained.

Univision, for example, provided significant evidence that the UHF Discount helps enable it to reach minority households in many of its markets, which tend to have low cable subscribership.<sup>9</sup> Univision also provided evidence that the activation of new DTV stations is creating additional interference to analog UHF stations with the accompanying loss of service.<sup>10</sup> As the Commission is aware, PCC's UHF station KSPX(TV), Sacramento, California, also has experienced unpredicted interference from a DTV station. This unexpected interference experienced by KSPX and other stations plainly refutes any suggestion that the DTV transition itself is ameliorating the competitive disparity between VHF and UHF stations or that eliminating the UHF Discount prior to the close of the DTV transition would be prudent policy.

This new evidence must be considered in addition to the comprehensive evidence presented by PCC and NAB in the 1998 *Biennial Review* proceeding. PCC has attached to this letter two studies presented by NAB as well as portions of PCC's Comments and Reply Comments in the 1998 *Biennial Review* to ensure that the Commission still has this information in mind as it considers the UHF Discount.<sup>11</sup> Taken together these materials continue to conclusively demonstrate:

- that UHF signals are technically inferior of VHF signals;
- that UHF signals are unable to reach over-the-air audiences comparable to those of VHF stations;
- that UHF stations do not gain cable carriage comparable to VHF stations;
- that UHF stations do not receive ratings as high as those of VHF stations;
- and that consequently, UHF stations are not as financially successful as their VHF competitors;

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<sup>8</sup> See Written *Ex Parte* Notice of Capitol Broadcasting Company, Inc. at 1 ("*Capitol Ex Parte*").

<sup>9</sup> See Univision Reply Comments at 6-7.

<sup>10</sup> See *id.* at 10-11.

<sup>11</sup> See Attachments A-D.

These facts supported by this evidence formed the basis for the Commission's decision in the *1998 Biennial Review*. As Granite demonstrates in its Reply Comments, none of these facts have changed, and the Commission consequently has no basis for reversing its decision.<sup>12</sup>

Moreover, the evidence provided in the *1998 Biennial Review* and in this proceeding disprove Capitol's assertion that the UHF Discount "result[s] in our current 35% cap actually being a 70% cap . . ." <sup>13</sup> In the analog world, UHF stations simply do not have the ability to reach anything approaching every household in their DMAs, even when cable carriage is considered. PCC presented evidence showing that in some cases, its stations covered as little as 27% of the area covered by VHF stations in the same market, and, in one case, could obtain cable carriage of only 4 of the 29 counties in the station's DMA.<sup>14</sup> Because cable carriage is based on a station's ability to deliver a quality signal to a sometimes distant headend, it is not surprising that UHF stations would be unable to garner the same level of cable carriage as their VHF counterparts. These types of disparities continue to exist and, with the additional DTV-generated interference noted by Univision and PCC, will only be made worse as additional DTV stations commence full power operations.

The persistence of all these physical and economic handicaps serve to confirm the wisdom of the Commission's retention of the UHF Discount in the *1998 Biennial Review*. Counting each UHF station as reaching only 50% of the households in its DMA allows station-group operators like PCC and Univision to use the UHF Discount to acquire and operate stations that otherwise might fail, enabling them to serve niche audiences that are frankly underserved by the Big Four networks. Rather than seeking ways to curtail UHF broadcasting by eliminating the Discount, the Commission should be seeking ways to encourage this type of service to the public.

**It Is Far Too Early for the Commission to Conclude that the DTV Transition Will Render the UHF Discount Obsolete.**

The Commission also found in the *1998 Biennial Review* that completion of the DTV transition might make it appropriate to modify or eliminate the UHF Discount.<sup>15</sup> Accordingly, the Commission indicated that it would conduct a rulemaking to examine the Discount's future near the close of the DTV transition.<sup>16</sup> As PCC indicated in its Comments, the DTV transition has not progressed sufficiently to determine whether the Commission's predictions will be accurate. As described above, Univision has persuasively demonstrated that the transition itself is harming analog UHF broadcasters' ability to serve their viewers, and that such harm is likely

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<sup>12</sup> See Granite Reply Comments at 6.

<sup>13</sup> See Capitol *Ex Parte* at 1.

<sup>14</sup> See PCC Comments in MM Docket No. 98-35, filed July 21, 1998 at 7; PCC Reply Comments in MM Docket No. 98-35, filed August 21, 1998 at 5-7.

<sup>15</sup> See *1998 Biennial Review*, 15 FCC Rcd 11058 11079-80.

<sup>16</sup> See *id.*

to increase as the transition progresses. Accordingly, eliminating the UHF Discount now based on the possibility of future obsolescence would be a grave error based on unsubstantiated speculation.

The Commission cannot yet be certain that the UHF Discount will not be needed in the post-transition world. Although the Commission properly has noted that UHF broadcasters' ability to maximize their service area could be an equalizer between UHF and VHF stations,<sup>17</sup> the Commission should be equally aware that its decision to base its initial DTV Table of Allotments on a principle of replication of service has locked in the signal-coverage disparities of the analog world. For example, in the Seattle market, PCC station KWPX-DT currently is licensed with 175kW ERP, while ABC affiliate KOMO-DT operates at 810 kW. Likewise, in the Washington, D.C. area, PCC station WPXW-DT is licensed at a power of 90 kW, while ABC affiliate WJLA-DT is licensed at 646 kW. As a consequence, PCC reaches 30% fewer Washington area viewers – or nearly 1,000,000 fewer viewers – than WJLA-DT. If these types of disparities remain widespread in the digital world, then some discount will be required if the Commission wishes to maintain the integrity of the over-the-air broadcast system. Thus it is simply too early to tell whether the UHF Discount will be needed in the DTV world. The Commission should follow the path laid out in the *1998 Biennial Review* and defer consideration of the rule until the post-transition world begins to take shape.

#### **The Commission Cannot Use a Section 202(h) Review to Re-Regulate Broadcasters.**

As PCC and Granite have pointed out, the Commission's responsibility under Section 202(h) of the Act is to evaluate its restrictions on broadcast ownership in the light of current levels of competition. Section 202(h) does not empower the Commission to impose new or increased restrictions through the biennial review process. Even if it did, however, the Commission still would bear a tremendous burden to show by the clear weight of the evidence that such new or increased restrictions are justified by the available evidence.

As demonstrated above, the parties advocating re-regulation of UHF broadcasters have presented no evidence to support that result. Consequently, the Commission has been given no justification for a conclusion that increased regulation of UHF broadcasters is at all warranted, let alone necessary in the public interest. It would be a perverse result indeed, if the Commission used this proceeding – intended by Congress to be a vehicle for principled deregulation – to re-regulate a class of broadcasters without any evidence to support that effort.

#### **Conclusion**

Finally, the Commission must recognize that eliminating the UHF Discount would be flatly inconsistent with nearly all the Commission knows about UHF broadcasting. Even if the Commission could find that the 50% discount underestimates somewhat the number of households some UHF broadcasters reach, it knows even more certainly that ascribing them the same viewership as is ascribed to local VHF stations would substantially overestimate their

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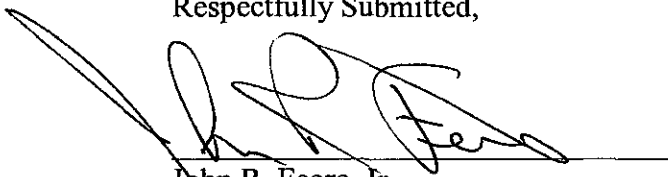
<sup>17</sup> See *id.*

Marlene H. Dorch, Esq.  
May 7, 2003  
Page 6

accessible audience. The Commission also knows that UHF stations already are competitively disadvantaged as compared to their VHF counterparts. Given their extensive competitive handicaps, it would be much more reasonable to err on the side of undercounting rather than overcounting UHF broadcasters' audience. Perhaps the greatest burden the Commission would bear in this entire proceeding would be to explain how it could possibly be necessary in the public interest to eliminate a rule that injures no one and contributes so much to the level of competition in the American broadcasting system. The Commission cannot meet that burden on this or any other record containing even a kernel of common sense. Accordingly, the

Commission must reaffirm its findings and conclusions in the *1998 Biennial Review* and find that the UHF Discount continues to be necessary in the public interest.

Respectfully Submitted,



John R. Feore, Jr.  
Counsel for Paxson Communications Corporation

Attachments

cc w/ attachments:

Chairman Michael K. Powell  
Commissioner Katherine Q. Abernathy  
Commissioner Kevin J. Martin  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
W. Kenneth Ferree, Chief, Media Bureau  
Paul Gallant, Special Advisor, Media Ownership Working Group

bcc: w/ attachments:

Lowell W. Paxson  
William L. Watson

I will  
send with  
cover letter  
and a stamp in  
copy of the  
file

Marlene H. Dorch, Esq.  
May 7, 2003  
Page 8

bbcc w/attachments:

Jason E. Rademacher  
Susan E. Anderson

# ATTACHMENT

A



# The “UHF Penalty” Demonstrated

Stephen E. Everett, Ph.D.

Director  
Audience Measurement and Policy Research  
National Association of Broadcasters

July, 1998

## *Introduction*

Do people at home watch a UHF network affiliate less, just because it's a UHF station? The findings reported here suggest the answer is "yes" – even after considering other factors that might enter into the mix, such as a station's network and its DMA rank.

Viewing data gathered in November, 1997, by Nielsen Media Research were analyzed for all Nielsen DMAs in an effort to identify systematic differences in viewing levels between UHF and VHF network affiliates (for the four major networks). In order to minimize programming differences from station to station, only prime-time ratings were included in this analysis. The research question: after controlling for possible intervening factors such as network programming line-up and market size, do UHF affiliates generate lower prime-time ratings than do VHF affiliates, on average? As a follow-up question, are VHF/UHF ratings differences related in any way to network affiliation or market size?

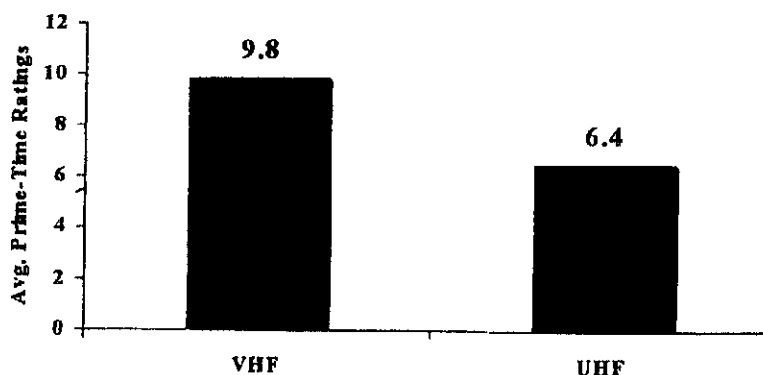
Data analysis was performed using Analysis of Variance (ANOVA).

## *Results*

### VHF Affiliates Draw Higher Ratings

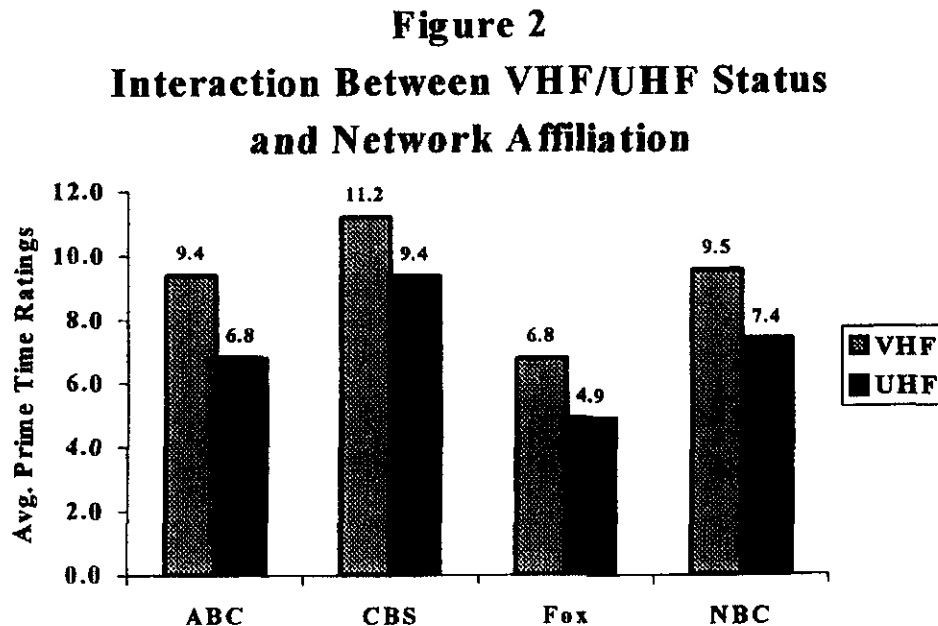
As Figure 1 shows, the group of VHF affiliates from all markets in this analysis averaged a 9.8 prime-time rating, while UHF affiliates averaged only a 6.4 rating. This is strong evidence that the conceptual premise for the "UHF discount" remains in force and, consequently, the discount is justified.

**Figure 1**  
**VHF/UHF Ratings Differences**



### "UHF Penalty" Worse for Some Networks

Figure 2 shows that the difference between VHF and UHF affiliates' average prime-time ratings is more pronounced for ABC and NBC affiliates than for CBS and Fox.<sup>1</sup>



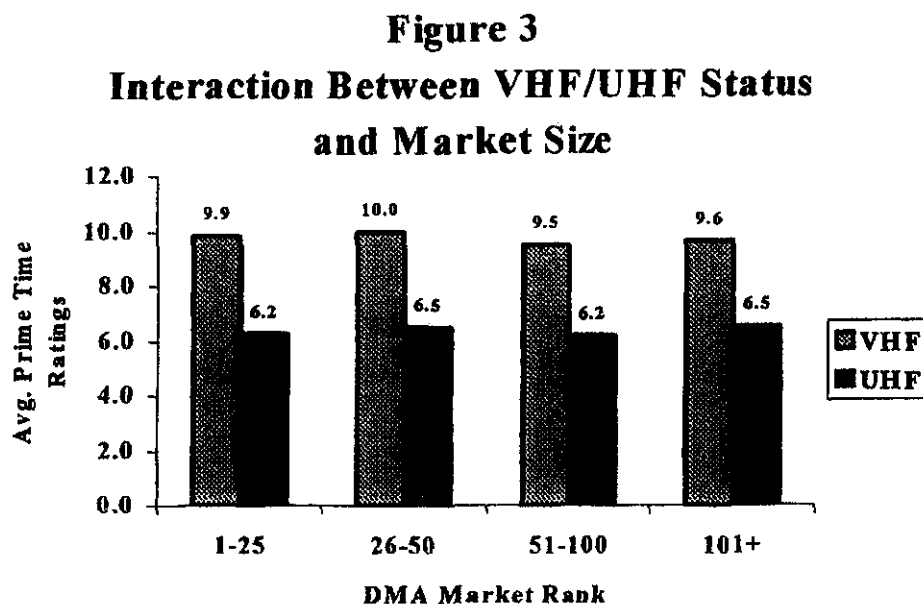
When the mean ratings are adjusted through ANOVA for market size differences and the overall VHF/UHF difference, this result is even more pronounced:

<u>Affiliation</u>	<u>V/U Difference</u>
ABC	3.1
NBC	3.6
CBS	1.2
Fox	1.0

<sup>1</sup> The average rating shown for each network is the unweighted mean of average ratings of affiliates for all DMAs (one average rating per affiliate in each DMA). As such, large and small markets have equal influence upon the national averages. Therefore these averages may not reflect the relative positions of the networks as commonly reported.

### "UHF Penalty" Present Across All Market Sizes

As shown in Figure 3, the difference between VHF and UHF affiliates' prime-time ratings exists for all four market groups analyzed in this study. There are only very slight differences in the magnitude of these "UHF penalties" from market group to market group.



### *Conclusion*

The "UHF Penalty" apparently continues to exist. When we account for the statistical effects of market size and network affiliation – two factors reasonably expected to be related to prime-time ratings from station to station – strong evidence emerges to continue to support the notion that UHF affiliates draw lower ratings because they are UHF stations.

This "UHF Penalty" shows up across markets of different sizes and for all four networks. However, the penalty is greater for ABC and NBC affiliates. Perhaps the station affiliation changes between CBS and Fox in recent times, in which Fox picked up numerous new VHF affiliates while CBS signed new deals with UHF affiliates, is responsible for diluting the difference somewhat for these two networks. The difference still is there, however.

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ATTACHMENT

B

# **A FINANCIAL ANALYSIS OF THE UHF HANDICAP**

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Vice President/Economist  
Research and Planning Department  
National Association of Broadcasters  
July 1998**

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# A FINANCIAL ANALYSIS OF THE UHF HANDICAP

## Introduction and Overview of Study

Within the television industry there is a noticeable distinction between those stations on the VHF and UHF bands. Due to technical properties, the coverage patterns of VHF stations generally are much larger than UHF stations. For a given service area, UHF stations have to use more power, thereby increasing their operating costs compared to VHF stations.

Given their inherent coverage disadvantages, UHF stations tend to attract smaller audiences than for their VHF counterparts, for the same programming.<sup>1</sup> With these smaller audiences, it easily follows that advertising revenues, pre-tax profits, and cash flows should be lower than comparative VHF stations. Of course, there are exceptions to this general conclusion, but we would expect to see a generally worse financial profile of UHF stations as compared to their VHF cohorts.

In this report we examine that hypothesis. Using data collected by NAB, Broadcast Cable Financial Management Association (BCFM), and Price Waterhouse, we can evaluate the past four years worth of data to determine whether UHF stations face a financial disadvantage.<sup>2</sup> These data are from an annual survey of all commercial television stations that attracts nearly a 70% response rate providing a reliable picture of the financial situation faced by commercial television stations.

To try and focus in on the impact of the UHF disadvantage we only examine affiliates of the four major networks – ABC, CBS, Fox, and NBC. By only looking at these stations we can compare stations with identical, or near-identical prime-time programming (assuming they clear a similar amount of their network programming). Comparisons are presented on a national historical basis for the years 1993-1996, by market size (Nielsen DMA) and affiliation type for the most recent year that data are available, 1996.

## National Comparison

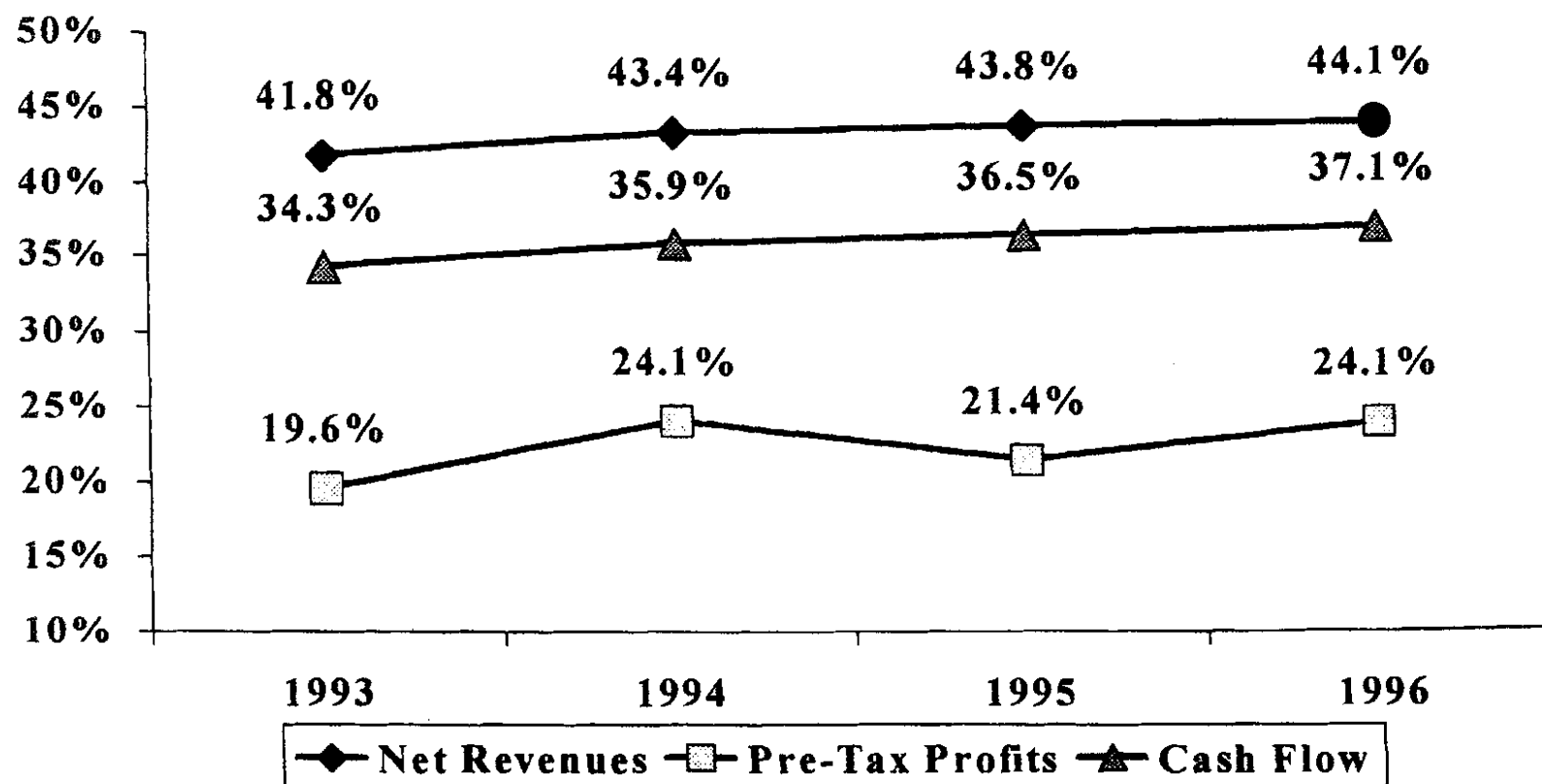
In Figure 1 we present the comparisons of all affiliates from the four major networks for the years 1993 through 1996. Three station's variables are compared – net revenues, pre-tax profits and cash flows. The averages for these two groups of stations are compared to generate the reported percentage.

The relative performance of UHF affiliates has improved in the four years shown, though they still suffer from a noticeable disadvantage, with the average UHF affiliate generating less than 50% of average VHF affiliate revenues, slightly more than a third of the cash flow and less than a quarter of the pre-tax profits.

<sup>1</sup> See S. Everett, "The 'UHF Penalty' Demonstrated," Appendix C, Comments of the National Association of Broadcasters, in MM Docket 98-35.

<sup>2</sup> Unfortunately, the data from previous years (before 1993) are not available for easy analysis.

**Figure 1**  
**UHF Affiliates\* Performance**  
**as a Percentage of VHF Affiliates\***



\* Includes ABC, CBS, Fox & NBC affiliates

Source: 1994 - 1997 NAB/BCFM Television Financial Surveys.



### **Market Size Comparison**

This disadvantage is evident when examined on a market size basis. Figure 2 shows the same comparative values for four market size groupings for 1996. What is particularly noticeable is that the disadvantage becomes less pronounced when you examine the smaller markets. In fact, in the smallest markets, DMA rankings 101 and above, the UHF affiliate generates only 20.3% less in revenues, 30.0% less in cash flow, and 32.7% less in pre-tax profits.

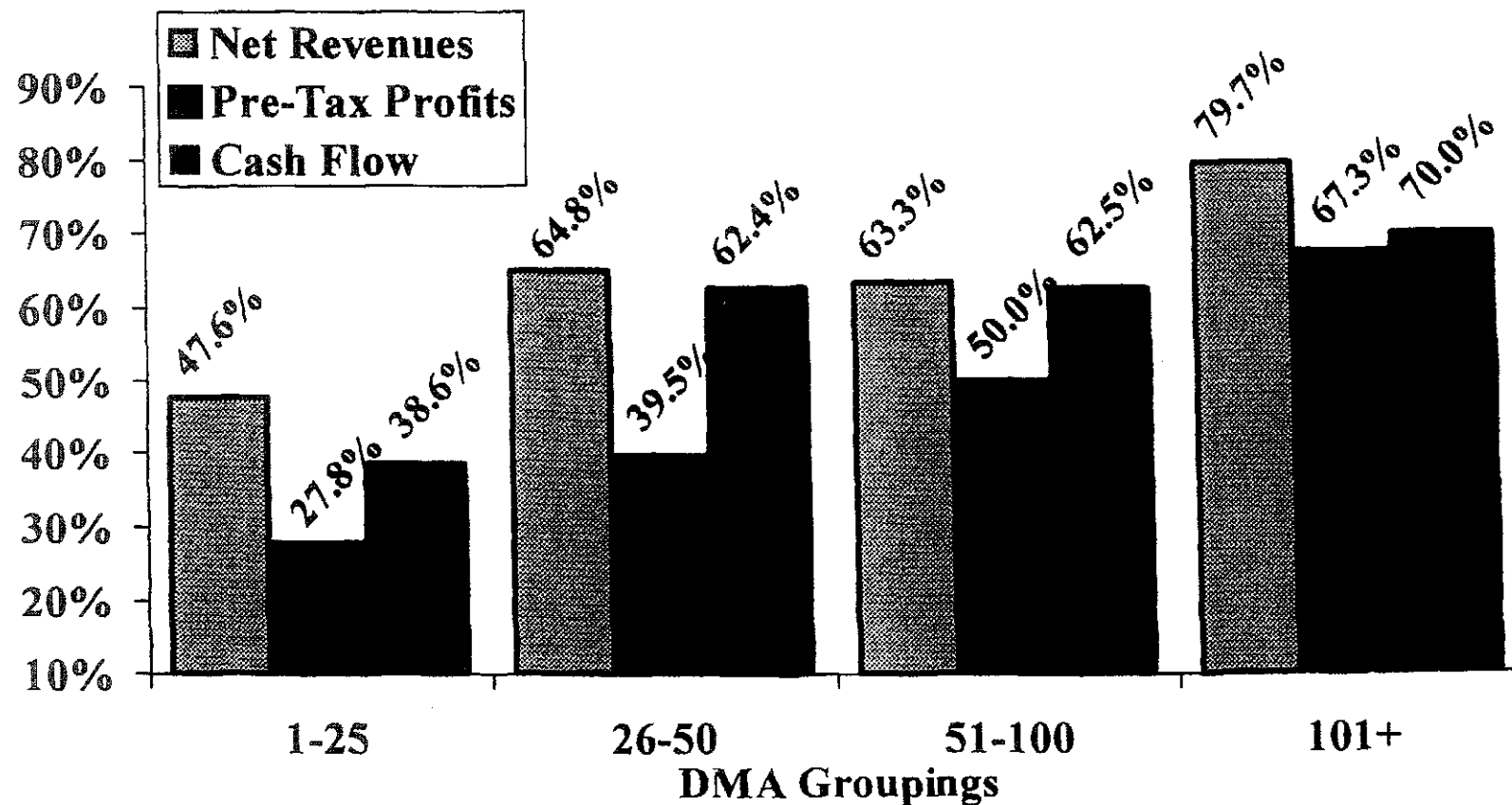
### **Affiliate Type Comparison**

The final comparison is with the different affiliate types. Figure 3 shows the comparative values for the four major affiliate types for 1996. All comparisons reinforce the UHF disadvantage, though to vastly different degrees. In fact, the average UHF CBS affiliate actually generated a loss while the average VHF affiliate generated positive pre-tax profits. On the other hand, the average UHF CBS affiliate came closest to their VHF counterpart in terms of net revenues, generating nearly 50% of that value.

### **Conclusion**

By examining the relative values for UHF and VHF affiliates nationally for the past four years, by market sizes and by networks, one only can conclude that UHF stations fared worse than their VHF counterparts. While in some cases (e.g., UHF stations in the smallest markets) that poorer performance is small, in all cases by examining several financial indicators (net revenues, pre-tax profits and cash flows) UHF stations still face a disadvantage.

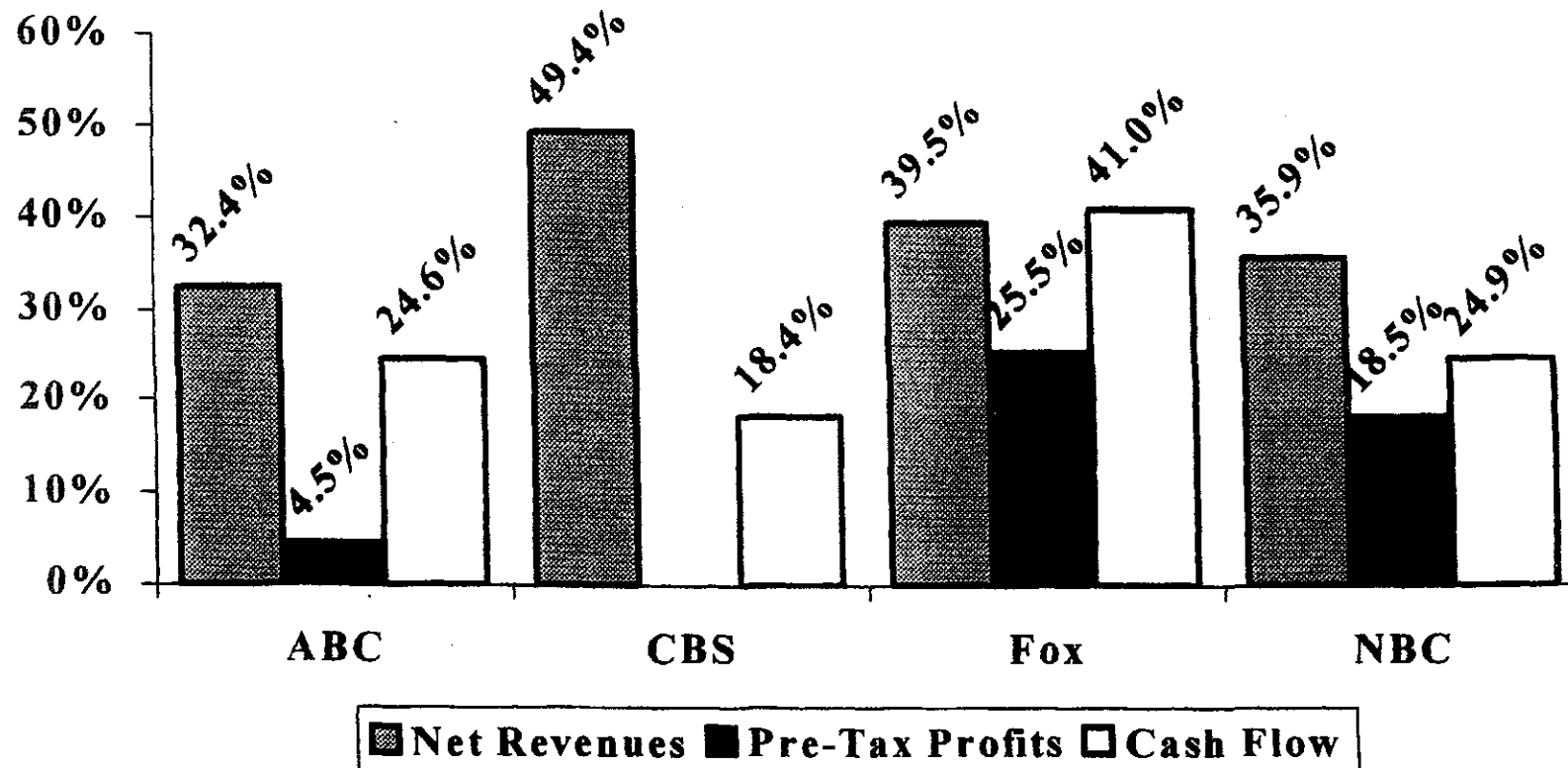
**Figure 2**  
**UHF Affiliates\* Performance as a Percentage**  
**of VHF Affiliates\* By Market Size in 1996**



\* Includes ABC, CBS, Fox & NBC affiliates

Source: 1994 - 1997 NAB/BCFM Television Financial Surveys.

**Figure 3**  
**UHF Affiliates Performance as a Percentage**  
**of VHF Affiliates By Affiliation Type in 1996**



Source: 1994 - 1997 NAB/BCFM Television Financial Surveys.

# ATTACHMENT

## C

Reply Comments of Paxson Communications Corporation, MM  
Docket No. 98-35, pp. 2-27, filed August 21, 1998.

## I. INTRODUCTION.

The same rationale which supported adoption of the UHF discount in 1985 warrants retaining the discount as the television industry moves toward the 21st century. UHF stations remain at a serious technical and competitive disadvantage to VHF stations. In its *Notice of Inquiry*, the Commission questions whether "improved television receiver designs, as well as the fact that many households receive broadcast channels via cable rather than by over-the-air transmission" have "corrected" the UHF/VHF disparity and therefore warrant eliminating the discount.<sup>2/</sup> As shown herein, although advances in receiver technology and mandatory cable carriage have allowed UHF stations to improve economically, the physical disparity between UHF and VHF television signals remains and still places UHF stations at a disadvantage vis-a-vis their VHF competitors. The Commission's suggestion that the conversion to digital television will further "equalize" UHF and VHF stations' signal reach is inaccurate. The Commission has continued the disparity by limiting the DTV power granted to UHF television stations. Accordingly, the UHF discount must remain intact to ensure UHF stations' continued ability to compete effectively in the DTV world.

Retaining the discount also will be critical to the development of new broadcast networks. Although the three largest broadcast networks -- ABC, CBS, and NBC -- own a small fraction of their affiliates,<sup>3/</sup> they are becoming economically unfeasible, and a new broadcast network utilizing UHF stations and subsequently lower power digital television

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<sup>2/</sup> *Id.* ¶¶ 26, 27.

<sup>3/</sup> ABC owns 10 of its 193 affiliates, CBS owns 14 of 210 affiliates and NBC owns 11 of its 214 affiliates. See sources cited *infra* notes 40-41; <ABC, [http://www.abc.com/local\\_stations/](http://www.abc.com/local_stations/)>; *Broadcasting & Cable Yearbook 1998* at F-77-83.

stations will be unable to succeed in the long term unless it owns its network distribution system. Paxson is well-acquainted with the challenges of establishing a new broadcast network. In less than two months (on August 31, 1998), Paxson will launch the seventh broadcast network, PAXTV, which will air a seven day a week schedule of family-oriented programming to communities across the United States. PAXTV will compete with the six existing networks for advertisers and viewers, enhancing the level of competition and diversity among the broadcast networks as well as cable networks. The UHF discount has enabled Paxson to acquire a significant number of UHF stations that will serve as its new network's primary distribution system. Absent the UHF discount, however, Paxson's ownership of a majority of its distribution would not be possible, and the PAXTV network would not exist.

In addition to retaining the UHF discount, the Commission should increase to 40% the national audience share cap on television station ownership. An increase by only 5% would not adversely impact competition or diversity at the national level and would provide important economic benefits for emerging networks.

Paxson also urges the Commission to relax the television ownership rule in one small but strategic way.<sup>47</sup> As Paxson has asserted in its comments in related rulemakings, the increasingly competitive and diverse nature of the television industry warrants changes in the rule. The Commission should modify the ownership rule to permit common ownership of television stations in separate Designated Market Areas, as defined by A.C. Nielsen, irrespective of contour overlap. Use of these separate, defined markets to determine

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<sup>47</sup> 47 C.F.R. § 73.3555(b)(1998).

permissible ownership would reflect far more accurately the economic realities of television service and competition than the current Grade B contour overlap standard.

## **II. THE UHF DISCOUNT.**

### **A. Background.**

Since 1985, the Commission's UHF discount rule has fostered the economic development of UHF television stations. In December of 1985 there were 365 UHF commercial television stations operating in this country.<sup>5/</sup> Since that time, the number has grown to 652, a 42% increase.<sup>6/</sup> The FCC adopted the UHF discount in connection with its overall review of the national television ownership rule which at that time provided that an entity could own up to 12 television stations nationwide so long as the stations' aggregate audience reach did not exceed 25% of television households in the U.S.<sup>7/</sup> The Commission applied and continues to apply the UHF discount to determine compliance with the audience limit cap, now 35% of total U.S. television households.<sup>8/</sup> In calculating a UHF station's audience reach, the Commission attributes to that station only 50% of the audience in its market whereas a VHF station is attributed with 100% of the audience in its market.<sup>9/</sup>

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<sup>5/</sup> *Broadcasting Cablecasting Yearbook 1985* at A-2.

<sup>6/</sup> *Broadcast Station Totals as of May 31, 1998, News Release* (rel. June 19, 1998).

<sup>7/</sup> *See Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order*, Gen. Docket No. 83-1009, 100 FCC 2d 74 (1985) ("1985 MO&O").

<sup>8/</sup> 47 C.F.R. § 73.3555(e).

<sup>9/</sup> *Id.*

As the Commission stated in its 1985 *MO&O*, the UHF discount's underlying purpose was to address the technical disparity between UHF and VHF stations. It was well-established at that time, and still is, that UHF station signal strength declines more rapidly over distance than VHF station signal strength. Because UHF stations by their very nature are unable to reach as many viewers as VHF stations, the Commission found that the technical disparity created a significant economic disparity, reducing competition among VHF and UHF stations and adversely impacting diversity. The UHF discount, thus, was designed to level the television playing field so that UHF stations would be in a much stronger position to compete with VHF stations. Nothing has changed since that time to establish equality of coverage between UHF and VHF stations.

***B. The Same Rationale Underlying Adoption of the UHF Discount Warrants Retaining the Discount.***

The disparities between UHF and VHF stations that existed in 1985 have not changed over the last 13 years. Although economically, due largely to changes in receiver technology and mandatory cable carriage, UHF stations are in an improved competitive position, the playing field vis-a-vis VHF stations remains uneven. Moreover, the cost of operating a UHF station continues to exceed the cost of operating a VHF station. In addition, it is too early in the digital television transition to predict its impact on the traditional UHF/VHF disparity. These circumstances warrant retaining the UHF discount.

***1. Changes in Technology and Cable Carriage Have Not Created a Level Playing Field Among UHF and VHF Stations.***

The last 15 to 20 years have witnessed dramatic changes in the television industry that have benefitted UHF stations. There have been significant advances in television receiver



technology making it easier for viewers to receive UHF signals over the air.<sup>10/</sup> In 1997, the United States Supreme Court upheld the constitutionality of the FCC's mandatory cable carriage rules.<sup>11/</sup> Those rules,<sup>12/</sup> adopted by the FCC pursuant to the Cable Television Consumer Protection and Competition Act of 1992,<sup>13/</sup> established the rights of television stations to mandatory carriage on cable systems within their television market. These rights have been critical to ensuring that UHF stations could reach via cable viewers who could not receive UHF station signals over the air especially in larger cities with large multi-family dwellings.

Unfortunately, receiver technology and mandatory carriage have not completely solved the basic disparity between UHF and VHF television stations -- the difference in over-the-air signal strength. The fact remains that UHF stations, based on technical disparity alone, do not reach as many viewers with an over-the-air signal as VHF stations. Although an improved television receiver may make it easier for a viewer to receive a UHF station's signal, receiver technology does not and cannot enhance signal strength nor can it overcome the topographic conditions that substantially weaken a UHF station's signal but have a minimal impact on VHF signal transmissions. It is well-established that the inherent propagation characteristics of a UHF channel make its signal transmissions far more

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<sup>10/</sup> Notice of Inquiry ¶ 26; *Broadcast Television National Ownership Rules, Notice of Proposed Rule Making*, MM Docket Nos. 96-222, 91-221, 87-8, 11 FCC Rcd 19949, 19954 ¶ 12 (1996).

<sup>11/</sup> *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174 (1997).

<sup>12/</sup> See 47 C.F.R. §§ 76.51-76.70.

<sup>13/</sup> Pub.L.No. 102-385, 106 Stat. 1460 (1992).

susceptible to terrain obstructions than VHF signals. VHF signals more easily can "bend" to accommodate terrain factors than can UHF signals. There is accordingly, an inherent technical handicap that cannot be corrected with receiver technology. These disparities are evidenced by the following Grade B coverage comparison of certain Paxson stations to VHF stations in the same market.

	<u>Paxson coverage as percent of VHF Stations</u>
Boston, MA	27%
San Francisco, CA	54%
Philadelphia, PA	57%
Washington, DC	62%

Similarly, mandatory cable carriage does not resolve the problem of how a UHF station reaches viewers who do not subscribe to cable. Cable penetration has increased over the past 13 years,<sup>14/</sup> but there remains a substantial number of television households that do not subscribe to cable. Indeed, cable penetration in the United States in 1997 was only 65%.<sup>15/</sup> In the five largest Designated Market Areas ("DMA") in the United States, as defined by A.C. Nielsen, cable penetration is less than or barely exceeds 75%. Cable penetration in the New York, New York DMA is 71%, and in the Los Angeles, California

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<sup>14/</sup> In 1985, cable penetration in the U.S. was 43.7% of U.S. households. *Broadcasting Cablecasting Yearbook 1985* at D-3. Cable penetration increased to 57.1% in 1990. *The Broadcasting Yearbook 1990* at D-3.

<sup>15/</sup> *Broadcasting & Cable Yearbook 1998* at xxxi.

DMA is 63%.<sup>16/</sup> The Chicago, Illinois DMA has a cable penetration of 62%, and the Philadelphia, Pennsylvania DMA has a cable penetration of 76%.<sup>17/</sup> The San Francisco, California DMA has a cable penetration rate of 71%.<sup>18/</sup> Thus, in these five largest markets alone, approximately 25% or more of the television households do not receive cable. Moreover, a significant percentage -- 55% -- of total television viewing in United States cable homes is on non-cable connected television sets. In cable homes, there are, on average, 2.6 television sets but only 1.4 are connected to cable.

In sum, notwithstanding must-carry and the expansion of cable, 30% to 35% of U.S. households still do not have cable. Because of their inferior signal strength, UHF stations are seriously handicapped in their ability to deliver a viewable signal to these non-cable viewers. Accordingly, neither cable penetration nor cable carriage of broadcast signals provides any justification whatsoever for the Commission's suggestion that the UHF handicap no longer exists.

**2. *UHF Stations Continue to Operate at an Economic Disadvantage When Compared to VHF Stations.***

As the technical disparity between UHF and VHF stations has continued, so has the economic disparity. Given their weaker signal strength and inability to reach as many viewers as VHF stations, UHF stations simply do not garner the same revenues or audience share ratings as their VHF competitors. Moreover, the costs of operating a UHF station

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<sup>16/</sup> *Id.* at C-8.

<sup>17/</sup> *Id.*

<sup>18/</sup> *Id.*

remain high, exceeding the costs incurred by VHF stations, and placing an additional economic burden on the owners of UHF stations.

The Comments submitted by the National Association for Broadcasters ("NAB") in this proceeding provide persuasive evidence that a "UHF penalty" continues to exist. As outlined in Stephen E. Everett's report, "The 'UHF Penalty' Demonstrated," VHF network affiliates on average receive higher ratings than UHF network affiliates.<sup>19/</sup> For instance, VHF affiliates in all of A.C. Nielsen's DMAs averaged a 9.6 prime-time rating while UHF affiliates in the same markets averaged only a 6.4 rating.<sup>20/</sup> ABC's VHF affiliates averaged a 9.4 prime-time rating in 1997 whereas their UHF counterparts only averaged a 6.8 rating.<sup>21/</sup> Similarly, NBC's VHF affiliates averaged a 9.5 rating whereas NBC's UHF affiliates averaged only a 7.4 rating.<sup>22/</sup> The differences also are consistent across all markets. In the 25 largest DMAs, VHF affiliates earned an average 9.9 rating whereas UHF affiliates averaged only a 6.2 rating.<sup>23/</sup> In DMAs ranked 51-100, VHF affiliates garnered an average rating of 9.5 whereas UHF affiliates garnered an average rating of 6.2.<sup>24/</sup>

Financially, VHF stations also outperform UHF stations. As reported in the

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<sup>19/</sup> Stephen E. Everett, Ph.D., "The 'UHF Penalty' Demonstrated," *submitted with the Comments of the National Association for Broadcasters*, MM Docket No. 98-35, July 21, 1998, at 1 ("Everett Study").

<sup>20/</sup> *Id.* This information is based on data compiled by A.C. Nielsen in November 1997. *Id.*

<sup>21/</sup> *Id.* at 2.

<sup>22/</sup> *Id.*

<sup>23/</sup> *Id.* at 3.

<sup>24/</sup> *Id.*

Comments of NAB,

[g]iven their inherent coverage disadvantages, UHF stations tend to attract smaller audiences than for their VHF counterparts, for the same programming. With these smaller audiences, it easily follows that advertising revenues, pre-tax profits and cash flows should be lower than comparative VHF stations.<sup>25/</sup>

The Fratrik Study submitted by NAB demonstrates that from 1993 through 1996, UHF network affiliates<sup>26/</sup> generated 41.8% to 44.1% of the net revenues, 34.3% to 37.1% of the cash flow, and 19.6% to 24.1% of the pre-tax profits that were generated by VHF affiliates.<sup>27/</sup> (THIS IS A 75% DISPARITY.) The disparity between UHF and VHF economic performance also is demonstrated by an analysis of net revenues, pre-tax profits and cash flow by affiliate type. For instance, in 1996, ABC's UHF affiliates generated only 32.4% of the net revenues, 4.5% of the pre-tax profits, and 24.6% of the cash flow that was generated by ABC's VHF affiliates.<sup>28/</sup> (AGAIN, THIS IS A 75% DISPARITY.) UHF stations affiliated with the Fox network in 1996 earned only 39.5% of the net revenues, 25.5% of the pre-tax profits, and 41.0% of the cash flow generated by VHF stations affiliated with the same network.<sup>29/</sup> (THIS IS A 60% DISPARITY.) Thus, even within the larger networks, there is a greater than 50% disparity between UHF and VHF stations.

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<sup>25/</sup> Mark R. Fratrik, Ph.D., "A Financial Analysis of the UHF Handicap," submitted with the Comments of NAB, MM Docket No. 98-35, July 21, 1998, at 1 (citations omitted) ("Fratrik Study").

<sup>26/</sup> ABC, CBS, Fox and NBC affiliates.

<sup>27/</sup> *Id.* at 2, Figure 1.

<sup>28/</sup> *Id.* at 5, Figure 3.

<sup>29/</sup> *Id.*

Relevant to the disparities in financial performance, of course, is the dramatic difference in the cost of operating a VHF station as opposed to a UHF station. Included in Exhibit A hereto is a chart outlining the costs of electricity for UHF and VHF stations based on channel, maximum effective radiated power ("ERP"), and transmitter power output, and the costs of transmission equipment. Again, the figures tell the story. Because a UHF station, by its very nature, must operate at higher power than a VHF station, and because the higher power requires more electricity and a more powerful transmitter, the costs of operating a UHF station are significantly higher. Electricity costs alone for a UHF station are almost three times the cost of powering a low VHF station and one and one-half times the cost of powering a high VHF station. Equipment costs are similarly high. A transmitter for a UHF station is likely to cost approximately \$1,250,000. A low channel VHF station need only expend \$400,000 for a transmitter.

In sum, the economic disparities between UHF and VHF stations continue and the evidence demonstrates that the economic disadvantages suffered by UHF stations are a direct result of the UHF band's technical shortcomings.<sup>30/</sup> Because the playing field between UHF

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<sup>30/</sup> Not surprisingly, given these statistics, the industry continues to view a UHF station as providing an inferior signal. One has only to review Fox's successful attempt in 1994 to affiliate with an increased number of VHF stations, resulting in a termination of affiliation agreements with UHF stations, to discern the industry's position. See Julie A. Zier, *Fog of war engulfs affiliation battles; affiliation of television stations with networks*, BROADCASTING & CABLE, Dec. 5, 1994, at 50 (describing the Fox network's "upgrades" to VHF stations in 16 markets and the three major networks' "downgrades" to UHF stations in 19 markets); Geoffrey Foisie, *Figuring the pluses, minuses of Fox-New World; Fox Television's affiliation agreement with New World Communications Group Inc.*, BROADCASTING & CABLE, May 30, 1994, at 10 (noting that Fox's affiliation with VHF stations will force one of the other three networks to "suffer from the inferior coverage of a UHF affiliate").

and VHF stations remains substantially unbalanced, the Commission must retain the UHF discount.

**3.     *The Implementation of Digital Television Will Not Eliminate the Disparity Between UHF and VHF Stations.***

The Commission's suggestion in the *Notice of Inquiry* that the full transition to digital television ("DTV") will eliminate the need for the UHF discount<sup>31/</sup> is inaccurate and premature at best and cannot support any change in the rule. It is impossible to predict at this time whether the conversion to digital television will alleviate the historic UHF/VHF disparity; indeed, in comparing the power levels assigned to VHF stations operating on UHF digital channels with those assigned to UHF stations operating on UHF digital channels, it is clear that the UHF/VHF technical disparity will exist notwithstanding the conversion to DTV.

Set forth below is a chart illustrating the DTV power levels assigned to certain of Paxson's UHF stations and those assigned to VHF stations that will operate on digital UHF channels in the same markets. The disparities in power level confirm that a substantial number of UHF stations, even in the DTV world, will suffer from technical signal

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<sup>31/</sup>     *Notice of Inquiry* ¶ 27.

deficiencies far in excess of 50%.

Market	PAXSON DTV Channel	PAXSON Power	V-U Channel	V-U Power	Disparity
New York, NY	30	104	28	164	37%
Los Angeles	38	210	36	711	70.5%
Philadelphia	31	50	26	1000	95%
Washington, DC	43	69	39	1000	93%
Dallas, TX	42	106	35	1000	89%
Seattle, WA	32	50	38	1000	95%

Adding to the uncertainty is the outstanding question of what if any mandatory cable carriage rights DTV stations will have. Until the industry and the Commission have more experience with this new technology, and specifically UHF station coverage vis-a-vis VHF station coverage as well as mandatory carriage rights, the Commission would be ill-advised to base any change in its ownership rules on the possibilities of DTV technology.

*a. The FCC's DTV Rules Do Not Place UHF Stations on an Even Par with VHF Stations.*

The implementation of DTV will not result in the "equalization" of UHF and VHF coverage areas. First, until the DTV transition is completed, it will be impossible for the FCC to determine whether UHF and VHF analog stations operating on a digital channel will have the same coverage. Although it is true that the majority of stations, whether currently operating on UHF or VHF channels, will operate in the UHF band, until stations are



operating with their authorized DTV facilities and this new technology is fully implemented, neither the FCC nor the industry is in a position to evaluate UHF and VHF station coverage.

Second, as evidenced by the power levels listed in the chart above, the FCC's DTV rules are not designed to eliminate the technical disparity between UHF and VHF television stations. Instead, the FCC's DTV allotment scheme is based primarily on replication of existing analog service.<sup>32/</sup>

We continue to believe that our service replication proposal, with some modifications, is the appropriate approach for implementation of DTV. We believe that providing DTV allotments that replicate the service areas of existing stations offers important benefits for both viewers and broadcasters. This approach will ensure that broadcasters have the ability to reach the audiences that they now serve and that viewers have access to the stations that they can now receive over-the-air.<sup>33/</sup>

The Commission has recognized that replication of existing UHF station service areas will not equalize VHF and UHF coverage areas. On reconsideration of the *Sixth Report and Order*, the Commission acknowledged "the difficulties that UHF stations may face under the current service replication plan . . . in competing with the higher-powered DTV service of existing VHF stations."<sup>34/</sup> The Commission concluded that additional measures were necessary to reduce the disparities "inherent in the current service replication process."<sup>35/</sup>

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<sup>32/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 14588, 14605, ¶ 29 (1997) ("*Sixth Report and Order*"), on reconsideration, *Memorandum Opinion and Order on Reconsideration of The Sixth Report and Order*, MM Docket No. 87-268, 13 FCC Rcd 7418 (1998) ("*Sixth DTV Reconsideration*"), appeal pending.

<sup>33/</sup> *Sixth Report and Order*, 12 FCC Rcd at 14605, ¶ 29 (emphasis added).

<sup>34/</sup> *Sixth DTV Reconsideration*, 13 FCC Rcd at 7450, ¶ 79.

<sup>35/</sup> *Id.*

Accordingly, the Commission modified its DTV rules to permit UHF stations to maximize their DTV coverage and service through power increases and use of beam tilting techniques.<sup>36/</sup> There is no guarantee, however, while DTV is still in the early stages, that all UHF stations will be able to take advantage of these opportunities or that in increasing power or using beam tilting techniques, the result will be a maximization of UHF service that is equivalent to VHF station coverage. In short, until UHF DTV stations' coverage can be fully assessed based on real-world experience, there is no basis for the Commission to conclude that the UHF discount would not be necessary to ensure UHF/VHF parity.

*b. Mandatory Cable Carriage Is a Virtual Unknown in the DTV Era.*

As noted above, mandatory cable carriage of broadcast stations has been critical to the improved economic status of UHF stations in recent years. Cable carriage of DTV signals, however, has yet to be resolved and it is not at all clear what the resolution will be. This ongoing uncertainty is an additional factor that weighs against making any changes to the UHF discount.

To say that digital must-carry is controversial is a gross understatement. The Commission's much-anticipated *Notice of Proposed Rule Making* on digital must-carry was only recently released on July 10, 1998.<sup>37/</sup> The issues raised in the *Must-Carry Notice* are both numerous and complex and include carriage of analog and digital signals during the DTV transition period, compatibility and carriage of multiple digital formats, picture quality

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<sup>36/</sup> *Id.* ¶¶ 79-85.

<sup>37/</sup> *Carriage of the Transmissions of Digital Television Broadcast Stations Amendments to Part 76 of the Commission's Rules, Notice of Proposed Rule Making*, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998) (the "*Must-Carry Notice*").

standards, and carriage of broadcasters' ancillary services included in the digital broadcast signal. The broadcast and cable industries are sharply divided over these issues,<sup>38/</sup> and indeed the Commission's *Must-Carry Notice* poses far more questions than solutions.

What is clear is that "must-carry" of DTV signals will take some time to resolve. The Commission cannot simply assume that mandatory cable carriage of UHF stations' DTV signals will alleviate UHF signal disparities vis-a-vis VHF stations. The must-carry factor in the transition to DTV accordingly provides no basis for any changes in the UHF discount.

**C. *The UHF Discount is Critical to the Development of New Broadcast Networks.***

As demonstrated by Paxson's own experience, the UHF discount is essential to the creation and successful development of new broadcast networks. On August 31, 1998, Paxson will launch a new broadcast network, PAXTV, the nation's seventh largest broadcast network. The long-term success of PAXTV will depend to a significant extent on its ability to distribute economically high quality programming to as many viewers as possible. No network can afford to pay affiliate fees and live off the income from network spot revenues only. Financial stability leading to increased network expenditures for original program fare can only come through owning as many distribution outlets as possible and enjoying the revenues from network spot, national spot and local ad sales. Absent the UHF discount, however, Paxson would be prohibited from owning all of its stations under the national ownership rule. And, absent ownership of its primary distribution system, Paxson would not attempt the launch of a new network.

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<sup>38/</sup> See Chris McConnell and Price Colman, *FCC tackles digital must-carry*, BROADCASTING & CABLE, July 13, 1998, at 8-9.

**1. PAXTV.**

PAXTV will be the nation's seventh largest broadcast network, providing a unique selection of programming unduplicated by the other networks. The majority of PAXTV programming will consist of one-hour drama, situation comedy, talk and information programs and movies, and will be family-oriented, focussing on family values and issues of broad interest. The PAXTV programming will have no senseless violence, no foul language and no explicit sex. Although many of these programs have aired or will air on other broadcast networks, PAXTV will be the first broadcast network to package the programs together with a family focus. Among the leading programs that will be featured on PAXTV are *Touched By An Angel*, *Promised Land*, *Dr. Quinn*, *Medicine Woman*, *Diagnosis Murder*, *Highway to Heaven*, and *Life Goes On*. Additional programs to be aired on the network include *I'll Fly Away*, *Dave's World*, *Christy*, *The Father Dowling Mystery Series*, *Love Boat*, and *Seventh Heaven*. PAXTV will have 15 hours of original fare a week, more than any other new network, and the shows will include *Little Men*, *The New Flipper*, *Neon Rider*, *It's A Miracle*, *Great Day*, *Women's Day* and two hours a week of children's educational programming.

**2. Paxson's UHF Television Stations Are Critical to the Successful Launch of PAXTV.**

Paxson and the new PAXTV network are the new economic paradigm for the future world of fractionalized television audiences. Paxson's strategy for the launch and growth of PAXTV establishes the new broadcast network organization. The traditional networks --

ABC, CBS and NBC -- own only a small fraction of their affiliates.<sup>39/</sup> The majority of their affiliates are separately-owned, operate independently of the network, and receive compensation from the network. The increasing level of competition for affiliates in the television industry, however, makes it clear that any new network must have a more established and controlled distribution system from its very inception. In order to compete successfully with ABC, CBS and NBC, as well as the newer networks, Fox, UPN and WB, and numerous cable television program services, a new broadcast network must be able to rely on a significant number of owned stations to reach viewers, to attract advertisers and to enjoy all levels of ad revenue (national, network and local).

As evidenced by the numerous affiliation switches that have taken place over the past few years, the competition among ABC, CBS, NBC and Fox for broadcast network affiliates, particularly those operating on VHF channels, is fierce.<sup>40/</sup> The stakes increased with the launch of the UPN and WB networks in 1995 as they vied (and continue to vie) with each other and the four larger networks for affiliates.<sup>41/</sup> In the face of this level of competition, Paxson has found that its chances of successfully launching a new network are substantially increased if it owns the majority of its network distribution. Paxson currently owns 49 television stations nationwide, and after the completion of pending acquisitions and

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<sup>39/</sup> *Broadcasting & Cable Yearbook 1998, supra note 2.*

<sup>40/</sup> *See supra note 27.*

<sup>41/</sup> *See David Tobenkin, New players get ready to roll; UPN, WB Network prepare to take their shots, BROADCASTING & CABLE, Jan. 2, 1995, at 30; Cynthia Littleton, WB, UPN rally the troops, BROADCASTING & CABLE, June 10, 1996, at 20 (describing "fierce" competition between WB and UPN for affiliates); Lynette Rice, Round three: UPN vs. The WB; competition to become the winning fifth network, BROADCASTING & CABLE, Aug. 26, 1996, at 5.*

transactions, will own a total of 69 stations nationwide. The majority of these stations are newly-constructed UHF stations or under performing UHF stations acquired by Paxson over the last four years. Over the past two years alone, Paxson has constructed 17 full power UHF stations, and has substantially rebuilt the technical facilities of approximately 20 more full power UHF stations. Paxson has infused these stations with capital, improved technical facilities and now with improved programming and will use these stations as its primary distribution system for the launch of PAXTV.<sup>42/</sup> Absent the UHF discount, however, Paxson would be prohibited from owning this number of stations and would not have as great an incentive to launch its new network.<sup>43/</sup>

Paxson's acquisition and use of UHF stations to "grow" its network are consistent with the role UHF stations have played in the development of new broadcast networks historically. Although the majority of the ABC, CBS and NBC network affiliates are VHF stations, the majority of the other three networks' affiliates are UHF stations. For instance, NBC has 153 VHF affiliates and only 61 UHF affiliates.<sup>44/</sup> CBS has 174 VHF affiliates and only 36 UHF affiliates.<sup>45/</sup> Fox, UPN and WB, however, have relied to a far greater extent on UHF stations to distribute new network programming. For example, UPN has 27 VHF

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<sup>42/</sup> PAXTV will also be entering into affiliation agreements with non-Paxson owned stations and cable systems.

<sup>43/</sup> The stations' aggregate audience reach exceeds 50% of U.S. television households not taking into account the UHF discount. Applying the UHF discount, Paxson's stations' are attributed with only 33.77% of U.S. television households.

<sup>44/</sup> NBC, <<http://www.nbc.com/stations>>

<sup>45/</sup> CBS, <<http://www.cbs.com/navbar/affiliates.html>>

affiliates and 129 UHF affiliates.<sup>46/</sup> Similarly, Fox has 132 UHF affiliates and 41 VHF affiliates.<sup>47/</sup> The PAXTV distribution system operates in the UHF band and all of its affiliates (which total 15) are UHF except for two.

**3. *Retaining the UHF Discount Ultimately Serves the Commission's Diversity and Competition Goals.***

By retaining the UHF discount, the Commission also will encourage the development of new broadcast networks like PAXTV, ultimately resulting in increased diversity and competition. It is undisputed that the development of the Fox, UPN and WB networks has contributed to competition among the networks and the diversity of network programming. Each of these new networks has proven to be an effective competitor to the three traditional networks -- ABC, CBS and NBC. For example, Fox has increased the level of competition among the networks for the rights to air professional sports programming. Both UPN and WB have increased the hours, types and quality of programming available to viewers today.<sup>48/</sup>

PAXTV will be an effective seventh competitor to the six existing broadcast networks. Its programming, when launched, airs seven days a week and is designed to appeal to a broad viewership but has a relatively narrow focus on family and values-oriented programming. Its programming is particularly responsive to governmental and societal

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<sup>46/</sup> UPN, <<http://www.upn.com/aboutsite/affiliates.html>>

<sup>47/</sup> Twentieth Century Fox, <<http://www.foxworld.com/usaff.html#al>>

<sup>48/</sup> See Michael Stroud, *Valentine vows improvement; United Paramount Network*, BROADCASTING & CABLE, June 15, 1998, at 45 (discussing UPN's efforts to target various demographic groups); Michael Stroud, *WB tops UPN season to date, Warner Brothers*, BROADCASTING & CABLE, Feb. 23, 1998, at 41 (discussing WB's programming designed to reach teenage audiences).

concerns that today's television programming is characterized more by sex and violence than family values. In developing this family-oriented package of programming, PAXTV will provide a unique alternative for both advertisers and viewers. And, through ownership of its primary distribution system, its UHF stations, Paxson can ensure that this unique alternative not only has present staying power among advertisers and viewers but also has the distribution base necessary to grow and develop into a full-fledged network. The total economics of the ownership of the network's distribution (national, network and local) will be the basic factor allowing PAXTV to offer competitive programming.

Retaining the UHF discount also will provide added incentive for future broadcast networks. Like Paxson, an entity contemplating the launch of a network must have a strong incentive to network its programming. It can only do so if it is permitted to own a significant amount of its television distribution. The UHF discount in part will keep open the door for future broadcast networks to develop a network organization in a similar manner, thus further enhancing the level of diversity and competition among program networks.

***D. Existing Ownership Interests Should Be Grandfathered in the Event the Commission Limits or Eliminates the UHF Discount.***

As demonstrated above, there is no basis for the Commission to eliminate or narrow the scope of the UHF discount. However, should the FCC decide to take such action, Paxson urges the Commission to grandfather all ownership interests existing at the time of its decision which would not comply with the national ownership rule absent the UHF discount. Grandfathering of existing ownership interests not only would be the fairest solution but also would be consistent with established precedent.



Paxson currently owns 49 television stations nationwide; after the completion of pending transactions, it will own 69 stations nationwide representing 66.3% of the television households in the country. Absent the UHF discount, Paxson's ownership interests would exceed the national cap. To require Paxson (and similarly-situated group owners) to divest their interests if the UHF discount is eliminated would be manifestly unfair and not in the public interest and the seventh network would cease to exist. Neither Paxson nor other group owners should be penalized for their full compliance with the FCC's ownership rules at the time those rules were in effect. Although the FCC has in various proceedings discussed whether to retain or modify the UHF discount, it has not suggested, as it has with other pending ownership rule changes<sup>49/</sup> that it would require divestitures upon a change in the rule nor has it conditioned the grant of sale applications on the outcome of pending proceedings. Moreover, requiring Paxson to divest a portion of its stations, part and parcel of the PAXTV network, could seriously hamper PAXTV's ability to compete in the network business and to expand its original program offerings.

In the face of changes to its ownership rules, the Commission has in the past grandfathered ownership interests that would not comply with the new rule. In those cases, the Commission concluded that forced divestiture would have consequences adverse to the public interest and therefore should be undertaken only in the most serious of circumstances.

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<sup>49/</sup> See, e.g., *Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221, 87-7, 11 FCC Rcd 21655, 21672, ¶ 38 (1996) (adopting interim duopoly waiver policy conditioned on outcome of Rule Making proceeding) ("*Second Further Notice*"); *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135 (1996) (announcing policy that certain waivers of one-to-a-market rule would be conditioned on outcome of television ownership proceeding).

For instance, when the Commission adopted the newspaper/broadcast cross-ownership prohibition in 1975, it required ownership divestitures only in the most "egregious" of cases, recognizing that "stability and continuity of ownership do serve important public purposes."<sup>50/</sup> In that proceeding, the Commission only required divestiture where the commonly-owned newspaper and broadcast interests had a monopoly in a community such that no other radio or television voice could be expected to serve the local community's needs and interests.<sup>51/</sup> The Commission reached a similar conclusion in not requiring divestiture of existing radio/television combinations which pre-existed the adoption of the radio/television cross-ownership rule.<sup>52/</sup>

The same rationale supports grandfathering of existing ownership interests in the event the Commission eliminates or restricts the UHF discount. The Commission must weigh the diversity and competitive benefits of divestiture against the adverse impact on local stations and network programming. Paxson submits that divestiture of its stations would have no benefit for the public in terms of increased diversity or competition. Of the 1,211 licensed commercial television stations in the United States,<sup>53/</sup> Paxson would own only 69,

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<sup>50/</sup> *Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, Docket No. 18110, 50 FCC 2d 1046, 1078, 1080 ("1975 Second R & O"), recons. granted, *Memorandum Opinion and Order*, Docket No. 18110, 53 FCC 2d 589 (1975), modified, *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

<sup>51/</sup> *1975 Second R & O*, 50 FCC 2d at 1081-82.

<sup>52/</sup> *Id.* at 1054.

<sup>53/</sup> *Broadcast Station Totals As of May 31, 1998, News Release* (rel. June 19, 1998).

only slightly more than 5% of the total number of commercial television stations.

Notwithstanding this relatively small percentage, Paxson's stations will represent a new programming voice, offering viewers and advertisers a viable and wholesome alternative to other network programming, and contributing to diversity and economic competition in local markets. Forced divestiture would only result in disruption of local programming and service and most likely a discontinuation of PAXTV network programming in local markets. Divestiture also could adversely impact PAXTV as a whole. If the network is not able to retain ownership of its distribution in the early years of its development, its chances of succeeding as an effective competitor to other networks will be slim indeed. In short, there would be no benefit to the public if Paxson was forced to divest a portion of its owned stations to comply with the national ownership rule.

A decision not to grandfather existing ownership interests also would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy<sup>54/</sup>

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.<sup>55/</sup> Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally

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<sup>54/</sup> 5 U.S.C. § 551(4)(1994) (emphasis added).

<sup>55/</sup> See, e.g., *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), cert. denied, 449 U.S. 832 (1980).

induced, settled expectations of private parties.<sup>56/</sup> The Supreme Court recognizes that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides 'an exceedingly persuasive justification.'"<sup>57/</sup> This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.<sup>58/</sup>

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements:<sup>59/</sup> (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one. Any decision by the FCC not to grandfather existing UHF ownership interests cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it adopted new ownership restrictions. *See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, First Report and Order*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); *1975 Second R & O*, 50 FCC 2d at 1074

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<sup>56/</sup> Retroactive rules are not *per se* improper. *E.L. Wiegand Div. v. NLRB*, 650 F.2d 463, 471 (3d Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

<sup>57/</sup> *Heckler v. Mathews*, 465 U.S. 728, 746 (1984) (citation omitted).

<sup>58/</sup> *Cf. Amendments of Parts 20 and 24 of the Commission's Rules, Report and Order*, WT Docket No. 96-59, 3 Communications Reg. (P&F) 433, 471 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *recons. denied*, 40 FCC 2d 493 (1973).

<sup>59/</sup> *See, e.g., Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 2 Communications Reg. (P&F) 76, 82 & n.42 (1995).

(grandfathering broadcast-newspaper cross-ownership); *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order*, Docket No. 12782, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), *aff'd*, *Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order*, Docket No. 14711, 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order*, Docket No. 20548, 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); *Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations, Notice of Proposed Rule Making and Memorandum Opinion and Order*, Docket No. 16068, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions). A failure to grandfather existing ownership interests would be a radical and unjustified departure from this longstanding practice.

Further, entities that have acquired UHF stations relied on Commission rules permitting the acquisitions based on application of the UHF discount. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of

retroactive regulation.<sup>60/</sup> Here, it would be grossly inequitable for the Commission to require divestiture of stations acquired in good faith and reliance on the regulatory regime.

Retroactive application of a new national ownership rule also would impose significant burdens on UHF stations. Many of the UHF stations acquired by Paxson over the last four years are weaker or newly-constructed UHF stations that would be economically devastated if divestiture is required. Under separate ownership, these stations would not have the same access to low cost, competitive diverse programming or significant financial resources, both of which are critical for newly operating and weaker stations. Forcing Paxson to sell these stations would adversely impact these stations' economic survival and, in turn, their service to the public.

Finally, there would be no statutory interest in applying the new rule. Congress has only required that the Commission review the UHF discount as part of an overall review of the ownership rules. There has been no mandate from Congress to repeal the UHF discount nor has Congress suggested that if ownership rule changes are adopted, they should be applied retroactively.

Failure to grandfather existing UHF ownership interests would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests: it would also disserve the public interest in enhanced television service.

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<sup>60/</sup> See, e.g., *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960), *cert denied*, 366 U.S. 908 (1961).

# ATTACHMENT

## D

Reply Comments of Paxson Communications Corporation, MM  
Docket No. 98-35, pp. 2-23, filed August 21, 1998.

among television program networks, and provide an incentive for the development of new networks.

In its own Comments in this proceeding, Paxson urged the FCC to increase the national television audience reach cap to 40%. Paxson demonstrated that this small increase in the national cap would have no adverse impact on the intensely diverse and competitive television industry. In these Reply Comments, Paxson also urges the Commission to create an exemption to the national audience reach cap for those companies with a non-controlling ownership interest in minority-owned and new entrant broadcasters. This exemption would encourage investment in minority-owned companies, without having any negative effect on diversity and competition.

Finally, Paxson supports elimination of the dual network rule. As demonstrated by numerous commenters, the prohibition on ownership of two broadcast networks no longer serves the public interest and should be repealed.

## ***II. THE UHF DISCOUNT.***

There is no basis for the suggestion made by some commenters that the UHF discount should be eliminated because the UHF signal handicap no longer exists or that retaining the UHF discount will have an adverse impact on diversity and competition.<sup>2/</sup> As Paxson demonstrated in

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<sup>2/</sup> See Joint Comments of Press Communications, LLC and Greater Media, Inc., MM Docket No. 98-35, filed July 21, 1998, at 4 ("Press Comments"); Comments of National Broadcasting Company, Inc., MM Docket No. 98-35, filed July 21, 1998, at 16 ("NBC Comments"); Comments of Center for Media Education, Chinese for Affirmative Action, The Civil Rights Forum, Feminist Majority Foundation, League of United Latin American Citizens, Minority Media and Telecommunications Council, NOW Legal Defense and Education Fund, Philadelphia Lesbian and Gay Task Force, Rainbow/PUSH Coalition and Women's Institute for Freedom of the Press, MM Docket No. 98-35, filed July 21, 1998, at 17 ("CME Comments"); Comments of ABC, Inc., MM Docket No. 98-35, filed July 21, 1998, at 18-21 ("ABC Comments").



its Comments,<sup>3/</sup> UHF stations' limited signal reach is a technical and economic handicap that has not been overcome through advanced receivers or mandatory carriage on cable systems. Nor will the handicap be corrected through the conversion to digital television ("DTV"). Because the conversion to DTV is based on service replication, not service maximization, UHF stations simply will not have the same DTV service areas as their VHF competitors. None of the commenters has submitted any evidence that the UHF discount has had an adverse impact on program diversity or economic competition. Indeed, the evidence demonstrates otherwise. Not only has program diversity and competition increased since 1985 when the UHF discount was adopted, but the UHF discount has proven essential to the growth of new broadcast networks, offering viable alternatives to the original three networks, ABC, CBS and NBC.

*A. Advances in Technology and Cable Carriage Have Not Corrected the UHF Handicap.*

*1. Receiver Technology Does Not Improve Signal Strength.*

Contrary to the assertions of ABC, Inc. ("ABC") and the Center for Media Education, *et al.* ("CME"),<sup>4/</sup> improvements in television receivers have not leveled the playing field between UHF and VHF stations. As Paxson established in its Comments, a UHF signal is inherently weaker than a VHF signal. The propagation characteristics of a UHF channel make its signal transmissions far more susceptible to terrain obstructions than VHF signals, and receiver technology simply cannot compensate for this inherent signal problem.<sup>5/</sup> As described in the

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<sup>3/</sup> Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998, at 5-12 ("Paxson Comments").

<sup>4/</sup> ABC Comments at 19; CME Comments at 17-18.

<sup>5/</sup> See Joint Comments of Fox Television Stations, Inc. and USA Broadcasting, Inc., MM Docket No. 98-35, filed July 21, 1998, at 19-21 ("Fox/USA Comments"), and

Fox/USA Comments, even a UHF station operating with maximum facilities, nondirectional ERP of 5,000 kilowatts and HAAT of 610 meters, could achieve "only 69.1 percent of the maximum low band VHF Grade B area coverage, and only 79.2 percent of the maximum high band VHF Grade B area coverage."<sup>6/</sup> Of course, no UHF station is able to achieve maximum facilities so it is clear that the actual differences between UHF and VHF coverage are much greater.<sup>7/</sup>

The Commission has recognized that

[d]ue to the physical nature of the UHF and VHF bands, *delivery of television signals is inherently more difficult at UHF*. It should be recognized that *actual equality between these two services cannot be expected* because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength. . . [T]he fundamental limitation of UHF television involves its ability physically to reach viewers . . .<sup>8/</sup>

Paxson is unaware of any changes in the laws of physics over the last 13 years that would change the inherent disparity between the UHF and VHF bands. UHF stations simply do not have the physical ability to achieve the signal coverage of a VHF station.<sup>9/</sup> None of the commenters

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Engineering Statement of Jules Cohen, P.E., Attachment B thereto.

<sup>6/</sup> *Id.* Attachment B at 3.

<sup>7/</sup> *Id.*

<sup>8/</sup> *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order, 100 F.C.C.2d 74, 93 (1985) (emphasis added).*

<sup>9/</sup> *See* Comments of the Association of Local Television Stations, Inc., MM Docket No. 98-35, filed July 21, 1998, at 8 ("ALTV Comments") ("[T]he limitations imposed on the UHF band are a matter of physics that do not change with the passage of time."). *See generally* Fox/USA Comments, Exhibit B.

arguing against retention of the UHF discount has offered one iota of evidence to suggest otherwise.

2. *Cable Carriage Has Not Corrected the UHF Handicap.*

Mandatory cable carriage has not been the cure-all that ABC suggests.<sup>10/</sup> Although UHF stations have benefitted from mandatory cable carriage, cable carriage has not completely alleviated the disparity between UHF and VHF stations. Even with mandatory cable carriage rights, UHF stations are *still disadvantaged* because of their weaker signals. The fact remains that only 65% of television households in the United States subscribe to cable.<sup>11/</sup> Thus, UHF stations, because of their weaker signals are disadvantaged in reaching the remaining 35% of the nation's television households that receive broadcast signals over-the-air.

ABC's assumption that cable subscribers *ipso facto* receive via cable all of a market's UHF stations is grossly mistaken. Nothing could be further from the truth. A television station must provide a Grade B signal to a cable system headend in order to obtain mandatory cable carriage. Because of their limited service areas many UHF stations do not provide Grade B coverage to all cable headends in their market. Accordingly, many UHF stations are not carried on all of the cable systems in their markets because their signals cannot reach the system's headend. In addition, based on signal problems, cable systems routinely request authority from the FCC not to carry a UHF signal in certain communities and the FCC routinely grants such requests.

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<sup>10/</sup> ABC Comments at 19.

<sup>11/</sup> *Broadcasting & Cable Yearbook 1998* at xxxi.

As an example, since 1996, numerous cable systems serving communities in the New York and New Jersey portions of the New York, New York Designated Market Area ("DMA"), as defined by A.C. Nielsen, have petitioned the FCC for permission not to carry Paxson's television station WIPX(TV), licensed to Bridgeport, Connecticut and included in the New York Area of Dominant Influence ("ADI"). The FCC has, in almost all cases, granted those petitions based in large part on the station's limited coverage of the market. *See, e.g., Petition of U.S. Cablevision, Memorandum Opinion and Order*, 12 FCC Rcd 21144, 21154 (1997), where the Commission granted the cable operator's petition to delete from WIPX(TV)'s television market communities in Dutchess, Orange, Putnam and Ulster Counties lying outside of the station's Grade B contour;<sup>12/</sup> *Petition of TKR Cable Company, Memorandum Opinion and Order*, 12 FCC Rcd 3525, 3533 (1997), in which the Commission authorized TKR Cable not to carry WIPX(TV) on its systems serving communities in Orange County, New York, and Hamilton, Mercer, Monmouth, Middlesex, Ocean, Passaic, Somerset and Union Counties, New Jersey, based on distance to the cable communities and the fact that WIPX(TV)'s Grade B contour did not reach the communities at issue; and *Petition of TCI of Northern New Jersey, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 891, 896 (1997), where the Commission granted the cable operator's petition to delete from WIPX(TV)'s television market 53 communities in northern New Jersey based in part on "dearth of viewership" and "lack of . . . Grade B coverage."<sup>13/</sup>

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<sup>12/</sup> Communities falling within WIPX(TV)'s Grade B contour were not deleted. *See id.* at 21153.

<sup>13/</sup> *See also Petition of TKR Cable Company, Memorandum Opinion and Order*, 11 FCC Rcd 17121, 17127, 17129 (1996) (citing lack of Grade B coverage and distance from cable communities as reasons to delete New York and New Jersey communities from WIPX(TV)'s television market); *Petition of Time Warner New York City Cable Group, Memorandum Opinion*

Paxson estimates that as a result of these decisions, WIPX(TV) is currently carried on cable systems serving only four of the 29 counties in its own ADI! The 25 counties in which WIPX(TV) is *not* carried represent 89% of the ADI's television households.<sup>14/</sup> Thus, in New York, due to its inability to obtain cable carriage, WIPX(TV)'s UHF handicap is 89%, not 50%.<sup>15/</sup>

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*and Order*, 12 FCC Rcd 13094, 13101 (1996), where the Commission granted Time Warner's request to delete the communities of Northern and Southern Manhattan, Eastern, Western, and Southern Queens, Western Brooklyn, and Staten Island, New York from WIPX(TV)'s television market because "[b]ased on geography and other relevant information, [the FCC] believe[s] that the New York City cable communities are sufficiently removed from WHAI that they ought not be deemed a part of the station's market for mandatory carriage purposes;" *Petition of Continental Cablevision of Western New England, Inc., Memorandum Opinion and Order*, 11 FCC Rcd 6488, 6509, 6510 (1996), *aff'd*, 12 FCC Rcd 12262 (1997), deleting 13 communities in Westchester and Rockland Counties, New York from WIPX(TV)'s television market because "these communities fall outside of the station's Grade B contour and are on the far side of the Hudson River from WHAI's service area;" *Petition of Time Warner Entertainment-Advance/Newhouse Partnership, Memorandum Opinion and Order*, 11 FCC Rcd 6541, 6555, (1996), *aff'd*, 12 FCC Rcd 12262 (1997), where the Commission ruled that 14 communities in Bergen County, New Jersey should be deleted from WIPX(TV)'s television market because "Time Warner's communities are, on average, 61 miles away from the station and fall outside the fringe of the station's Grade B contour. In addition, the cable communities are separated from the station by New York City and the Hudson River;" *Petition of Clear Cablevision Inc. and Manchester Cablevision Inc. both d/b/a/ Adelphia Cable Communications, Memorandum Opinion and Order*, 11 FCC Rcd 22282, 22292 (1996), where the Commission deleted from WIPX(TV)'s television market the communities served by Adelphia's Ocean County, New Jersey cable systems citing "lack of historical carriage," "dearth of audience," "geographic distance," and "lack of Grade B coverage."

<sup>14/</sup> *Broadcasting & Cable Yearbook 1997* at C-198.

<sup>15/</sup> The story is similar for Paxson's other UHF stations. WPXB(TV) (formerly WGOT-TV), licensed to Merrimack, New Hampshire, in the Boston, Massachusetts ADI, is not carried on a number of cable systems in the ADI because it lacks the signal strength to provide sufficient Grade B coverage to communities served by those cable systems. *See, e.g., Greater Worcester Cablevision, Inc. Worcester, Massachusetts: For Modification of Television Broadcast Station WGOT's ADI, Memorandum Opinion and Order*, 12 FCC Rcd 17347 (1997); *Petition of Time Warner Cable for Modification of Market of Television Station WGOT-TV, Merrimack, New Hampshire. Memorandum Opinion and Order*, 12 FCC Rcd 23249 (1997).

The UHF/VHF disparity is further exacerbated by the fact that by virtue of statutory and regulatory restrictions, VHF stations enjoy preferred cable channel assignments over their UHF counterparts. Television viewers in cable households, like noncable viewers, locate the relatively highly-rated broadcast network programming on the lowest television channels, as most "Big Three" broadcast network affiliates are VHF stations.<sup>16/</sup> Moreover, the typical television viewer logically begins the search for news or entertainment programming at or near the very lowest channel he or she receives, rather than initiating the "channel surfing" efforts at some arbitrary, double-digit channel that might correspond to or be near a local UHF station's channel assignment.

The audience's natural preference for low channels is compounded in the cable world. Under statutory and regulatory channel positioning restrictions, cable systems generally must assign television stations their on-air channels.<sup>17/</sup> VHF stations, therefore, almost always obtain very low channel assignments in cable line-ups, whereas UHF channels naturally find themselves carried on high channels. As a result, VHF broadcast stations (and cable networks assigned to low channels by the local cable operators) obtain more initial "foot traffic" from television viewers than UHF stations, which, as a result of their mandated high channel assignments, see much less "foot traffic."

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<sup>16/</sup> See Paxson Comments at 19-20.

<sup>17/</sup> 47 U.S.C. § 534(b)(6) (1994); 47 C.F.R. § 76.57 (1997).

A station or cable program with a low channel assignment, then, enjoys a higher probability of achieving a measurable level of viewership than one placed on a higher channel.<sup>18/</sup> With the strong connection between channel position and profit in mind, cable operators prior to the adoption of the 1992 Cable Act were known to "root out" local broadcast stations from "prime VHF channel slots" in favor of "less popular cable services in which the cable operator ha[d] an equity interest and/or in which the cable operator [was] selling advertising time."<sup>19/</sup> In that manner, the cable programmer would have the opportunity "to catch" a much larger number of "grazing" viewers than would be possible at a higher channel assignment. Today, the typical cable channel line-up features less-than prominent high assignments for very low rated channels such as public, educational, government, leased access and similar program offerings, which, of course, surround the mandated channel assignments for local UHF stations.

Paxson believes that mandatory cable carriage has been critical to the survival of UHF stations. It has not, however, eliminated the inherent signal handicap suffered by all UHF television stations. These circumstances warrant retaining the UHF discount.

***B. The Conversion to DTV Will Not Alleviate the UHF Handicap.***

Press Communications, LLC's ("Press") argument that the UHF handicap will be eliminated through the implementation of DTV<sup>20/</sup> ignores the basic premise underlying the allocation of DTV channels. The Commission's DTV allotment scheme is based primarily on

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<sup>18/</sup> See House Committee on Energy and Commerce, H.R. Rep. No. 102-628, at 55. (1992) (House Committee "is aware that certain cable programmers offer cable systems financial incentives to be placed on a lower channel number where viewers initially 'graze' in search of an attractive program").

<sup>19/</sup> *Id.* (quoting testimony before Committee).

<sup>20/</sup> Press Comments at 5.

replication of existing analog service.<sup>21/</sup> The Commission fully considered adopting a service maximization approach that would roughly equalize coverage among all television stations, regardless of current service areas.<sup>22/</sup> Based in part on numerous objections from broadcasters, the Commission ultimately decided to base DTV channel allotments on service replication.<sup>23/</sup>

Because DTV channels, power levels and height requirements are based on replication of existing service areas (rather than potential coverage with maximum facilities), it is not surprising that there are significant disparities between VHF stations' DTV technical parameters and those assigned to UHF stations. Paxson demonstrated in its Comments that a greater than 50% power disparity exists between analog UHF stations operating on DTV UHF channels, and analog VHF stations operating on DTV UHF channels.<sup>24/</sup> In some markets, UHF stations have as little as 5% of the power as that assigned to VHF stations, thus ensuring that UHF stations will continue to operate with weaker signals, reaching fewer viewers even with the conversion to DTV.<sup>25/</sup>

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<sup>21/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, 12 FCC Rcd 14588, 14605 (1997) ("Sixth Report and Order"), on reconsideration, *Memorandum Opinion and Order on Reconsideration of The Sixth Report and Order*, 13 FCC Rcd 7418 (1998) ("Sixth DTV Reconsideration"), appeal pending.

<sup>22/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Second Further Notice of Proposed Rule Making*, 7 FCC Rcd 5376, 5379 (1992).

<sup>23/</sup> *Sixth Report and Order*, 12 FCC Rcd at 14605.

<sup>24/</sup> See Paxson Comments at 13.

<sup>25/</sup> See Fox/USA Comments at 22 and Attachment B thereto.



*C. DBS Will Not Ameliorate the VHF/UHF Signal Disparity.*

The increased number and variety of video program distributors, while increasing competition in the video program market, has failed to reduce the significant disparities between VHF and UHF stations. As Univision noted in its Comments, the widespread use of high-quality (and even digital) cable, the Direct Broadcast Satellite Service ("DBS"), VCRs and DVD players over the past several years has made the viewing public less inclined to accept inferior, sometimes "snowy" UHF signals received at the fringe of reception.<sup>26/</sup> Moreover, many DBS viewers simply cannot receive local signals without the use of their own personal indoor antennas, and, despite some improvement in antenna designs, those antennas often do not receive clear -- or even acceptable -- UHF signals.<sup>27/</sup> As a result, consumers continue to prefer the clear broadcast signals available primarily from VHF stations.

DBS's efforts to expand into the delivery of local broadcast networks are unlikely to improve the position of UHF stations. As the Commission is aware, the DBS industry currently is working to develop antennas that would enable DBS subscribers to receive over-the-air broadcasts in addition to satellite signals.<sup>28/</sup> At this point, however, broadcasters have not received any assurance from the DBS industry that these new devices would be able to overcome the UHF reception difficulties experienced by the current generation of over-the-air antennas. As a result, even if DBS subscribers at some future time are able to receive broadcast signals,

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<sup>26/</sup> See Comments of Univision Communications Inc., MM Docket No. 98-35, filed July 21, 1998, at 4 ("Univision Comments").

<sup>27/</sup> See *id.* at 4-5.

<sup>28/</sup> See *Competition in the Video Programming Distribution Market (Fourth Annual Report)*, 11 CR 147, 200 (1998).

millions of such viewers likely could continue to receive inferior UHF signals. And when these viewers have the option of choosing among scores of digital satellite signals, clear over-the-air VHF signals or "snowy" over-the-air UHF signals, it is unlikely indeed that UHF stations will have any measurable viewership from DBS subscribers.

**D. Even With the UHF Discount, UHF Stations Do Not Perform as Well Economically as VHF Stations.**

It is not surprising that ABC, Press and CME fail to cite to any statistics demonstrating that UHF and VHF stations perform at an economic par with each other. The economic evidence demonstrates clearly that the UHF handicap is alive and well. VHF stations, by virtue of their superior signal strength, cable carriage and preferred cable channel assignments, continue to outperform UHF stations by more than 50% with respect to *both* revenues and audience share ratings. Coupled with the significant costs of operating a UHF station, there can be no doubt that UHF stations remain economically handicapped when compared to their VHF competitors.

The comments filed in this proceeding provide convincing evidence of the economic disparity between UHF and VHF stations. In its Comments, Paxson showed that, because a UHF station, by its very nature, must operate with higher power than a VHF station, and because higher power requires more electricity and a more powerful transmitter, it is far more expensive to operate a UHF station than a VHF station. A UHF station's electricity costs alone range from one and one-half to three times a VHF station's electricity costs.<sup>29/</sup> Whereas a transmitter for a

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<sup>29/</sup> Paxson Comments at 11 and Exhibit A.

low channel VHF station costs about \$400,000, it costs a UHF station almost three times that figure for a UHF transmitter.<sup>30/</sup>

The economic studies submitted with the Comments of the National Association of Broadcasters ("NAB") demonstrate that VHF network affiliates on average receive higher ratings and generate much higher revenues than UHF network affiliates.<sup>31/</sup> As set forth in the Everett Study, VHF affiliates in all DMAs averaged a 9.8 prime-time rating while UHF affiliates in the same markets averaged only a 6.4 prime-time rating.<sup>32/</sup> Similar evidence showing the disparity in ratings was presented in ALTV's Comments.<sup>33/</sup>

The disparity in revenues is even greater, far exceeding 50%. For example, from 1993 through 1996, UHF affiliates of ABC, NBC and CBS generated 41.8% to 44.1% of the net revenues, 34.3% to 37.1% of the cash flow, and 19.6% to 24.1% of the pre-tax profits that were generated by VHF affiliates of the same networks.<sup>34/</sup> In 1996 alone, ABC's UHF affiliates generated only 32.4% of the net revenues, 4.5% of the pre-tax profits, and 24.6% of the cash flow that was generated by ABC's VHF affiliates, reflecting a 75% disparity.<sup>35/</sup> If the UHF

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<sup>30/</sup> *Id.*

<sup>31/</sup> See Stephen E. Everett, Ph.D., *The "UHF Penalty" Demonstrated* (the "Everett Study"), at 1, submitted as Appendix C to the Comments of the National Association of Broadcasters, MM Docket No. 98-35, filed July 21, 1998 ("NAB Comments"); Mark R. Fratrik, Ph.D., *A Financial Analysis of the UHF Handicap*, submitted as Appendix D to NAB Comments, at 1 (the "Fratrik Study").

<sup>32/</sup> Everett Study at 1. See Paxson Comments at 9.

<sup>33/</sup> See ALTV Comments at 21-25.

<sup>34/</sup> Fratrik Study at 2, Figure 1.

<sup>35/</sup> *Id.* at 5, Figure 3.

handicap no longer exists, how does ABC explain this 75% disparity between its UHF and VHF affiliates' economic performance?

The comments and evidence submitted in this proceeding overwhelmingly support Commission action retaining the UHF discount. It cannot be disputed that UHF stations are handicapped in signal reach and that this handicap results in inferior economic performance. Mandatory cable carriage has helped to strengthen UHF stations, but it by no means has corrected the UHF handicap. And, it is certain that digital television and DBS will only perpetuate, not alleviate the UHF handicap. In short, the continued existence of the UHF handicap warrants retaining the UHF discount.<sup>36/</sup>

***E. The UHF Discount Serves to Enhance Diversity and Competition.***

There is no factual basis for CME's assertion that the UHF discount stifles competition and diversity because it purportedly "provides an unfair competitive advantage" to UHF owners

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<sup>36/</sup> ABC's suggestion that the Commission alternatively apply the UHF discount on a market-by-market basis is untenable and unsupported by the meager evidence that ABC submits. See ABC Comments at 21. The 50% discount is a bright-line rule, easy to apply and accurately reflecting the UHF handicap described above. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rule Making*, 11 FCC Rcd 19895, 19901 (1996) ("We seek to apply bright line attribution tests wherever possible"); *Amendment of Parts 20 and 24 of the Commission's Rules, Report and Order*, 11 FCC Rcd 7824, 7881 (1996) (adopting "bright line" twenty percent attribution rule in CMRS ownership context in part to avoid "problems" inherent in "frequent case-by-case determinations of control, which are time-consuming, fact-specific, and subjective"), *modified*, 11 FCC Rcd 8714 (1996), *recons. denied*, 12 FCC Rcd 14031 (1997); *Amendment of Commission's Rules to Establish New Personal Communications Services in the 2 GHz Band, Further Order on Reconsideration*, 9 FCC Rcd 4441, 4441 (1994) (observing that Commission previously had "reaffirmed our bright-line cross-ownership attribution standards" for cellular and broadband PCS because such rules "would result in a faster, less burdensome licensing process;" on further reconsideration, Commission added a multiplier to PCS ownership rules similar to that used in broadcast attribution rules).

over VHF owners.<sup>37/</sup> Indeed, CME is wrong for more reasons than can be counted. First, as described above, the economic performance of UHF stations simply does not bear out CME's conclusion. UHF stations that garner only 25% of the revenues earned by their VHF counterparts do not have any advantages, much less a competitive advantage. Second, the historical improvement in UHF service and the growth of new broadcast networks, enabled by the UHF discount, has resulted in *increased* program diversity, offering viewers more choices, and *more effective* competition for the larger and more established television networks. Finally, since the UHF discount was adopted, the video programming industry has exploded -- there are far more alternatives for viewers today than existed in 1985, making it clear that the UHF discount has not had and could not have an adverse impact on competition or diversity.

*1. The UHF Discount Has Contributed to the Growth in UHF Television Service.*

CME fails to recognize that absent the UHF discount, group owners like Paxson and Fox would have very little incentive to acquire and invest capital in UHF stations. Moreover, with the increased ownership opportunities made available by the UHF discount, group owners are able to realize economies of scale and operational efficiencies that improve UHF station performance, and in turn, service to the public.

UHF stations' limited signal reach and difficulties in securing cable carriage simply make UHF stations less attractive properties than VHF stations. As a result, the economic investment necessary to improve UHF station performance could not be sustained if a group owner could not use the UHF discount to acquire a sufficiently large number of stations.

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<sup>37/</sup> CME Comments at 18-19.

Through the UHF discount, Paxson, Fox and other group owners have acquired a significant number of UHF stations, thereby overall increasing UHF station potential and resulting in an overall increase in the number of UHF stations nationwide. Over the past two years alone, Paxson has constructed 17 full power UHF stations, and has substantially rebuilt the technical facilities of approximately 20 more full power UHF stations. In addition, Paxson's "Proposal to the FCC to Increase Broadcast Diversity," if adopted, could result in the licensing of an additional 100 television stations, many of them in the UHF band.<sup>38/</sup> Absent the UHF discount, however, there would be no incentive for Paxson or any other group owner to engage in these efforts to enhance the UHF service.

Moreover, by virtue of the UHF discount, UHF stations under Paxson's ownership are able to take advantage of the efficiencies that naturally arise under group ownership. Through the sharing of programming, administrative and technical support, and marketing and advertising sales services, Paxson's UHF stations operate more efficiently. The cost savings realized from these economies of scale have significant public interest benefits because they enhance each station's ability to provide high-quality programming and public service.<sup>39/</sup> Operating independently of the network or under separate ownership, however, it is unlikely that these stations could achieve the same efficiencies or provide the same level of service.

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<sup>38/</sup> See Paxson Comments at 30 n.62.

<sup>39/</sup> See NBC Comments at 15-16; ABC Comments at 6-7; Comments of CBS Corporation, MM Docket No. 98-35, filed July 21, 1998, at 11 ("CBS Comments").

2. *The UHF Discount Is Critical to the Development of New Networks.*

The comments in this proceeding amply demonstrate that the UHF discount provides a significant incentive for the development of new broadcast networks.<sup>40/</sup> With the explosive growth in the video programming industry, the broadcast network models established by ABC, CBS and NBC in the 1950s are simply unworkable for a broadcast network emerging in 1998. The majority of the "Big Three" affiliates are separately-owned, operate independently of the network and receive compensation from the network. This model may have worked when only three broadcast networks dominated the video programming market, but it is not feasible for a new network that must compete not only with the "Big Three" networks, but also with Fox, UPN and WB and numerous other media for affiliates, viewers and advertisers. The new economic paradigm based on ownership of, rather than affiliation with, distribution outlets will be the key to any new network's success. Ownership of a sufficient number of distribution outlets, however, can only be achieved through the UHF discount.

In ten days, Paxson will launch its new broadcast television network, PAXTV, that will serve as the new model for broadcast network organization. Paxson currently owns 49 television stations nationwide, and after the completion of pending acquisitions and transactions, will own a total of 69 stations, that will serve as the primary distribution system for PAXTV. It is only through its ownership of these stations that Paxson can ensure that PAXTV will have sufficient distribution at its launch. Absent the UHF discount, of course, Paxson's ownership of this

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<sup>40/</sup> See ALTV Comments at 27-29.

number of stations would be prohibited<sup>41/</sup> and it is unlikely that Paxson would even be attempting the monumental task of launching a new broadcast network.

With its unique programming and large-scale distribution in top U.S. television markets, PAXTV will provide a much-needed alternative to video programming currently available to U.S. consumers. Unduplicated by other broadcast and cable networks, PAXTV's programming will consist of one-hour drama, situation comedy, talk and information programs and movies, that will be family-oriented, focusing on family values and other issues of broad interest to families. PAXTV programming will be free of the explicit sex, senseless violence and foul language that is found in so many television programs today. At its launch, PAXTV will offer 15 hours of family-oriented original programming each week, including *Little Men*, *The New Flipper*, *Neon Rider*, *It's a Miracle*, *Great Day*, *Women's Day* and two hours of children's educational informational programming. The network's leading prime-time programs further exemplify the family focus -- *Touched By An Angel*; *Promised Land*; *Dr. Quinn, Medicine Woman*; *Diagnosis Murder*; *Highway to Heaven*; and *Life Goes On*. In short, as the seventh broadcast network, PAXTV not only will be able to offer viewers more program choices but also will serve as a viable competitor for the other broadcast networks. None of this would be possible, however, if Paxson could not use the UHF discount to ensure an adequate distribution system for its network programming.

Paxson's reliance on UHF stations to build its network distribution system is consistent with the development of other networks. Fox, UPN and WB all have used and continue to use

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<sup>41/</sup> The stations' aggregate audience reach exceeds 50% of U.S. television households not taking into account the UHF discount. Applying the UHF discount, Paxson's stations are attributed with only 33.77% of U.S. television households.



UHF stations to "grow" their networks. As outlined in Paxson's Comments, the majority of the newer networks' affiliates are UHF stations. UPN has approximately 27 VHF affiliates, compared to 129 UHF affiliates.<sup>42/</sup> Fox's affiliates consist of 132 UHF affiliates and only 41 VHF affiliates.<sup>43/</sup> It also is undisputed that these new networks have increased competition and diversity in the television industry. As each network has attempted to target various demographic groups, they have provided viable alternatives to "Big Three" network programming. And, they have enhanced the level of competition in the network programming market, as evidenced by Fox's successful bids to air national sports programming. PAXTV will make an equally significant contribution to network competition and program diversity.

3. *National and Local Competition for the Delivery of News, Information and Entertainment to American Consumers Has Never Been Greater.*

The UHF Discount has not had, nor will it have, any negative effect on program diversity or competition. As Paxson and numerous other commenters observed in their comments, Americans currently are faced with a tremendously broad array of news, information and entertainment vehicles.<sup>44/</sup> NAB pointed out that a double-digit increase in the number of television stations during just the last eleven years has come about during a time when cable systems, offering an ever increasing number of channels, and VCR players have enjoyed amazing increases in their household penetration rates.<sup>45/</sup> The enormous number of video

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<sup>42/</sup> Paxson Comments at 19-20 & n.46.

<sup>43/</sup> *Id.* at 20 & n.47.

<sup>44/</sup> See, e.g., Paxson Comments at 28; ABC Comments at 3; CBS Comments at 3.

<sup>45/</sup> See Mark R. Fratrik, Ph.D., *Media Outlets by Market - Update*, submitted as Appendix A to NAB Comments.

programming options presented to the consumer today has created an intensely competitive market for viewers and national and local advertising revenues.<sup>46/</sup> At the same time, competition has reduced the share of such revenues received by a single entity.<sup>47/</sup> In today's multichannel, multioutlet video market, every video program supplier and distributor is constrained by the unforgiving forces of a highly competitive marketplace.

In addition, consumers easily can step outside of the video programming market to obtain timely news, information and entertainment programming. Like television, the number of radio stations has grown dramatically, such that, today, the average DMA has approximately 84 commercial radio stations.<sup>48/</sup> Those markets also boast an average of 18 newspapers reaching over 1,000 readers and 10 news magazines with at least a five percent penetration rate.<sup>49/</sup> Even more significantly, the Internet has experienced explosive growth in the past five years. Chairman Kennard observed just last month that 75 million Americans now use e-mail and that number is expected to almost double in just three years.<sup>50/</sup> And, according to the Newspaper Association of America, more Americans use the Internet than subscribe to daily newspapers.<sup>51/</sup> Americans can select from among an unquantifiable number of web sites both here and abroad

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<sup>46/</sup> See, e.g., NBC Comments at 4.

<sup>47/</sup> See *id.*

<sup>48/</sup> NAB Comments at 5 (citing *Media Outlets by Market - Update*).

<sup>49/</sup> *Id.*

<sup>50/</sup> Chairman William E. Kennard, Remarks before the National Association of Regulatory Utility Commissioners (July 27, 1998), at 3.

<sup>51/</sup> Comments of the Newspaper Association of America, MM Docket No. 98-35, filed July 21, 1998, at 36.

for news, information and even real-time video and audio programming. As eloquently noted by NAB, "[c]ompetition for the eyes and ears of the American public has never been greater and the prospects for further competition have never been more promising."<sup>52/</sup>

Today's world of seemingly endless choices for information and entertainment fuels fierce demand for viewers and advertisers among television, cable, DBS, radio, newspapers, magazine and Internet content providers. This competition, in turn, assures the presence of multiple media viewpoints in national and local markets. Indeed, the market has now succeeded in accomplishing the important goal of providing a plurality of viewpoints, a goal which lies at the very center of the Commission's broadcast ownership regulatory scheme. It is simply impossible to believe that in an environment with scores of broadcast stations in each local market, 100-channel cable and DBS systems, and widespread Internet usage, the UHF discount will have an adverse impact on the diversity of viewpoints available to American consumers.<sup>53/</sup>

Finally, the UHF discount need not even be factored into the Commission's analysis of

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<sup>52/</sup> NAB Comments at 4-5.

<sup>53/</sup> Contrary to the suggestion of some commenters, "large broadcast ownership groups" simply cannot "monopolize the available viewpoint outlets," thus causing a reduction in viewpoint diversity. See CME Comments at 8. Broadcast owners are subject to a number of significant FCC and antitrust constraints on the numbers and types of "viewpoint outlets" they may own (e.g., broadcast/newspaper cross-interest ban, broadcast/cable cross-interest ban, one-to-a-market rule, local radio ownership rules, etc.). As a result, an attempt to acquire an excessive number of viewpoint outlets in a given market is legally impossible. Given the growth in broadcast stations, cable penetration and other media over the past decade, such a reduction in outlets also is practically and financially impossible. In addition, the sheer number of video program suppliers and distributors competing at the national, regional and local level for every broadcast, cable and DBS viewer ensures that a handful of broadcasters are unable to "control" the public's video programming options. In any event, CME's documentation of a few anecdotal examples of broadcasters' possible attempts to influence the content on one or more owned stations by citation to media outlets in fact demonstrates that such efforts are quickly (and often harshly) publicized by the broadcasters' competitors in the fierce market for viewers and readers.

local competition and diversity of viewpoints . Whether or not the FCC retains the UHF discount, broadcasters will remain subject to the television ownership rules which restrict the number of stations a single entity may own in a local market.<sup>54/</sup> Even with the changes to the ownership rules that have been proposed, including Paxson's proposal set forth in its Comments,<sup>55/</sup> broadcasters essentially will be limited to owning one television station per market. The UHF discount, accordingly, will not change the ownership or competitive structure of local markets.

***F. The Increase in the National Audience Cap Has Not Eliminated the Need for the UHF Discount.***

There is no basis for any argument that the increase in the national audience cap to 35% eliminates the need for the UHF discount. ALTV's Comments make it quite clear that there was no intent on the part of Congress in enacting the Telecommunications Act of 1996<sup>56/</sup> to substitute the 35% cap for the then-existing 25% cap coupled with the UHF discount.<sup>57/</sup> Indeed, had Congress intended a change in or elimination of the UHF discount, it surely would have included such a provision in the 1996 Act.

Moreover, as noted by ALTV, Congress's clear intention in adopting the 35% cap and eliminating the numerical limit on station ownership was *to relax*, not *tighten*, the national ownership limits. Elimination of the UHF discount would plainly run counter to Congress's

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<sup>54/</sup> 47 C.F.R. § 73.3555(b) (1997).

<sup>55/</sup> Paxson Comments at 31.

<sup>56/</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

<sup>57/</sup> ALTV Comments at 2-3.

intent. A 35% national audience reach cap without the UHF discount *would be more restrictive* than a 25% cap and the UHF discount! For instance, based on its current ownership and assuming it retained ownership of its stations in the largest markets, under a 25% cap and the UHF discount, Paxson would be permitted to own 29 stations nationwide. If Paxson were subject to the 35% ownership cap, and without applying the UHF discount, it would be permitted to own only 13 television stations. Clearly, this is not the result that Congress intended when it enacted the 1996 Act.

### ***III. THE NATIONAL OWNERSHIP RULE.***

Paxson reaffirms the proposal set forth in its Comments that the Commission increase the national audience share cap to 40%. A 40% limit would reflect the realities of the video programming marketplace, as described above, with no impact on diversity and competition in local markets. An increase in the audience share cap also would result in increased investment in small-market and minority-owned television stations.

To establish truly meaningful incentives for minority and small business investment, Paxson proposes that the Commission not apply the audience share cap to ownership interests in stations owned and controlled by minority entities and new entrants, or in the alternative, increase the cap above 40% with respect to those stations that would be minority-owned.

Earlier this year, FCC Chairman Kennard called upon broadcasters to identify ways to increase minority ownership of broadcast stations.<sup>58/</sup> Numerous broadcasters, including Paxson, have responded to the Chairman's call. On July 1, 1998, Paxson submitted to Chairman Kennard

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<sup>58/</sup> William E. Kennard, *An Era of Opportunity*, Remarks to National Association of Broadcasters, Las Vegas, Nevada (Apr. 7, 1998).

RECEIVED ORIGINAL

Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEB - 3 2003

In the matter of

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

2002 Biennial Regulatory Review –	)	
Review of the Commission's	)	
Broadcast Ownership Rules and	)	MB Docket No. 02-277
Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications	)	
Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations	)	MM Docket No. 01-235
and Newspapers	)	
	)	
Rules and Policies	)	
Concerning Multiple Ownership of	)	MM Docket No. 01-317
Radio Broadcast Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF  
PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation  
601 Clearwater Park Road  
West Palm Beach, FL 33401

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FILED

Dated: February 3, 2003

## SUMMARY

The record compiled in this proceeding establishes two points beyond dispute. First, the Commission must immediately and significantly reform the broadcast television ownership restrictions under review. No evidence has been provided to indicate that these restrictions are indispensable to the public interest. Accordingly, under the strict mandate established by Congress and the D.C. Circuit Court of Appeals, the Commission has no choice but to relax these restrictions. Paxson proposed in its Comments and reiterates here its view that the Commission should begin dismantling the ownership restrictions in a measured manner, by (1) immediately increasing the national ownership cap to 50% with a presumption that the cap will be increased biennially by 2.5% until it reaches 60%; (2) eliminating the newspaper/broadcast cross-ownership rule; and (3) reforming the duopoly and radio/television cross-ownership rules. Only by beginning this deregulatory process now can the Commission fulfill Congress's commands as interpreted by the courts, and avoid further legal challenges.

Second, the record conclusively demonstrates that the Commission must retain the UHF discount. As Paxson has pointed out, the deregulatory biennial review proceeding is not the preferred vehicle for considering the UHF discount, because the discount already is deregulatory in nature. Accordingly, retention of the UHF discount should not be subject to the same strict standard applied to the review of the Commission's ownership *restrictions* required by this proceeding. In any case, the record reveals that the UHF discount produces no harms and many benefits to the public interest. The UHF discount remains necessary to level the competitive playing

field for UHF and VHF broadcasters and continues to preserve the profitability of UHF broadcasting, which is the backbone of the construction and emergence of competitive broadcast networks. The Commission decided just two years ago to retain the UHF discount at least until the end of the DTV transition, and no evidence has emerged since that would justify eliminating the discount earlier. Accordingly, the Commission should provide a strong statement that the UHF discount will remain in place at least for the remainder of the DTV transition, and that's its post-transition existence will be determined in a later proceeding.



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**Before the  
Federal Communications Commission  
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Radio Broadcast Stations in Local Markets	)	
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Definition of Radio Markets	)	MM Docket No. 00-244

**REPLY COMMENTS OF  
PAXSON COMMUNICATIONS CORPORATION**

Paxson Communications Corporation (“Paxson”) hereby files these Reply Comments in the above-captioned proceeding<sup>1</sup> to emphasize two points. First, the record in this proceeding does not give the FCC sufficient evidence to retain in their current form the 35% national broadcast television ownership cap, the newspaper/broadcast cross-ownership rule, the duopoly rules, or the radio/television cross-ownership rules. Congress and the D.C. Circuit have placed a high burden on the

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<sup>1</sup> See 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 17 FCC Rcd 18503 (2002) (the “*Ownership NPRM*”). See also FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes

Commission to justify these rules and the current record does not satisfy the required legal standard. Accordingly, the Commission now must significantly loosen these ownership restrictions with an eye toward eventually considering their repeal, or the courts likely will throw them out in their entirety.

Second, both the record and sound public policy considerations overwhelmingly support retention of the UHF discount, regardless of any adjustments the Commission makes to the national ownership cap. Only one commenter, a group led by the United Church of Christ ("UCC"), filed comments urging elimination of the UHF discount. Its argument relied solely on information previously before the Commission when the issue was last addressed, and the UHF discount retained, in the 1998 Biennial Review.<sup>2</sup> The Commission fully considered these arguments then, and no intervening factors have arisen to undermine the Commission's fundamental conclusion that the UHF discount will remain necessary in the public interest at least until the end of the DTV transition.

UCC's argument against the UHF discount and the various arguments presented in favor of retaining the Commission's other ownership restrictions are part of a misguided attempt to divert the Commission from the statutory deregulatory focus of the

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Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules, Public Notice, DA 02-2476 (rel. October 1, 2002).

<sup>2</sup> See Comments of the Office of Communication, Inc. of the United Church of Christ, Black Citizens for A Fair media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press, filed January 2, 2003, at 56-58 ("UCC Comments"); see also 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Biennial Review Report, 15 FCC Rcd 11058, 11078-80 (retaining UHF discount) ("1998 Biennial Review").

biennial review process and instead convert it into a vehicle for re-regulation.<sup>3</sup> These arguments fail to marshal any relevant facts or evidence to support the Commission's current rules or elimination of the UHF discount. The Commission must resist any temptation to re-regulate without any supporting evidence, if it intends to fashion rules that will survive judicial review.<sup>4</sup>

**I. The Evidence in This Proceeding Does not Satisfy the Heavy Burden Congress and the D.C. Circuit Have Placed on the FCC to Justify Retention of Its Ownership Restrictions.**

As Paxson described in its Comments, the Commission's television ownership restrictions have been rendered superfluous by the wave of diversity and competition that has swept the broadcast television and video entertainment industries over the past twenty year.<sup>5</sup> The Commission's failure to justify the 35% national television ownership cap in the face of current competitive realities led the D.C. Circuit to reverse the Commission's retention of the rule and instruct the Commission to either develop a convincing record supporting any national ownership cap or abandon it.<sup>6</sup> This same rigorous standard now must be satisfied to allow retention of any of the Commission's ownership restrictions currently under review.

Supporters of the ownership restrictions have had many months to provide whatever evidence would support the continuation of these rules. The FCC itself has

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<sup>3</sup> See, e.g., Comments of the American Federation of Labor and the Congress of Industrial Organizations, filed January 3, 2003; Comments By the Coalition for Program Diversity, filed January 3, 2003.

<sup>4</sup> See Michael K. Powell, *Should Limits on Broadcast Ownership Change? Yes.*, USA TODAY, January 22, 2003, at 11A.

<sup>5</sup> See Paxson Comments at 7-8.

expended unprecedented time and resources to develop studies of the current media marketplace and to hold public forums and hearings to entertain public input on ownership issues. No evidence provided to date by the Commission's studies or by public commenters supports retention of the Commission's ownership restrictions. It is not the Commission's responsibility to look further to find justifications for the 35 % cap or its other ownership restrictions: no such justifications exist. To be sure, several commenters have alleged that evils flow from media consolidation generally,' but these allegations amount to little more than the simple and unsupported argument that "big is bad." What is missing is any evidence that "big is bad," or, more to the point, that lifting the television ownership restrictions will harm the public.

The Commission has heard this "big is bad" argument from members of the public and individual members of Congress.' Of course these voices cannot be ignored, but it is equally important that they be analyzed as opinions, not as fact, and be given no more weight than they deserve. Neither political statements nor public opinion can overly influence the Commission and no unsupported fear of the effects of relaxing the ownership rules can support any Commission regulation. Certainly, statements of opinion cannot be treated as evidence that concrete harms will be caused by relaxation of the ownership rules.

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<sup>6</sup> See *Fox Television Stations v. FCC*, 280 F.3d 1027 (2000), rehearing granted in *part*, 293 F.3d 537 ("FOX JV Stations Rehearing").

<sup>7</sup> See *e.g.*, Comments of Consumer Federation of America, Consumers Union, Center For Digital Democracy, and Media Access Project; Comments of American Federal Of Labor and Congress of Industrial Organizations.

<sup>8</sup> See, *e.g.*, Bill McConnell, *A Weary Powell Gets Thumped on Dereg, but He Tells Senate Panel That Critics' Tales are Melodramatic*. BROADCASTING AND CABLE, Jan. 20, 2003, at 5.

To the contrary, there is ample evidence that, in many cases, bigger is better. Below, Paxson will describe the significant public interests served by allowing broadcasters to take advantage of the economies of scale and efficiencies offered by the UHF discount.<sup>9</sup> Many commenters have shown persuasively the value of broadcast/newspaper combinations.” The Commission has recognized the benefits of consolidated ownership in other contexts as well.” As Paxson pointed out in its Comments, viewers reap many benefits from large media companies, such as better and more diverse programming choices.<sup>12</sup> More importantly, there is no evidence or indication that the existence of large media corporations is undermining the Commission’s traditional policies of preserving localism and diversity. The record simply presents no evidence that the big media corporations feared by commenters in favor of the ownership restrictions are making it any more difficult for small and locally oriented broadcasters to survive. The market will always demand diversity and localism. There is no evidence that the current ownership restrictions are necessary to achieve these goals

The burden is not, however, on television broadcasters to show the benefits of lifting the ownership restrictions. As the Commission well knows, without evidence of

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<sup>9</sup> See Section II, *infra*.

<sup>10</sup> See, *e.g.*, Comments of Gannett Co., Inc. at 4-7; Comments of the National Association of Broadcasters at 60-67.

<sup>11</sup> Amendment of Section 73.658(g) of the Commission’s Rules - The Dual Network Rule, *Report and Order*, 16 FCC Rcd 11114, 11122-23, 11123-24 (2001); Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12930 (1999) (“*Duopoly Order*”).

<sup>12</sup> See Paxson Comments at 13-14.

any concrete harm that will flow from relaxation of the ownership rules (and no such evidence exists), the rules cannot be sustained in their present form. Nonetheless, Paxson has not argued that all the ownership rules must be swept away wholesale.

Instead, Paxson has proposed a measured approach that would allow the Commission to carry out Congress's deregulatory purpose without foreclosing future regulatory remedies to correct any imbalances that deregulation might cause. For example, with respect to the 35% national television ownership cap, Paxson has proposed an incremental relaxation first to 50%, with a presumption that the limit would increase by 2.5% with each biennial review until the cap is at 60%. This course would allow the Commission to both give the regulatory relief demanded by the record while retaining enough control to reverse course if public harms materialized. Similarly, in the duopoly context, Paxson has proposed a reasonable set of reforms, even though the record fails to show the need for any local television ownership restrictions. This reasonable approach compares favorably to the often fevered arguments made in favor of retaining the restrictions in their current form. Given the strict statutory standard the Commission must meet in justifying its ownership restrictions going forward, a measured, deregulatory approach is the only defensible position.

The FCC simply does not have a record to support retention of the existing rules. Faced with the evidence before it, the Commission should not need the threat of legal action to choose the Congressionally-mandated course of deregulation. Nonetheless, that threat looms if the FCC retreats from deregulation. The broadcast industry surely will take the FCC to court. Given the state of the record and the previous chances the D.C. Circuit has given the Commission to adhere to Congress's deregulatory directives,

if the Commission retains the current rules, they most likely will be thrown out in their entirety. Consequently, if the Commission believes that relaxation of the rules eventually may cause public harm, the worst thing it could do would be to try to retain the rules in their current form. If the Commission wants to remain in the business of regulating broadcast ownership, its only choice is to begin reforming them as Paxson has suggested.

## **II. PAXSON HAS DEMONSTRATED THAT THE UHF DISCOUNT IS NECESSARY IN THE PUBLIC INTEREST.**

As Paxson explained in its initial Comments, the UHF discount continues to advance several vitally important public interest goals.<sup>13</sup> Less than three years ago, in the 1998 Biennial Review, the FCC agreed, affirming that the UHF discount remained necessary to allow UHF station owners to effectively compete with their VHF counterparts.<sup>14</sup> The same remains true today.

For example, the Commission recognized that as long as UHF stations broadcast NTSC signals, their inferior signal coverage area undermines their ability to reach both over-the-air viewers and cable head-ends, severely restricting their ability to reach the majority of viewers in their markets.<sup>15</sup> As Paxson demonstrated in its Comments, these handicaps remain.<sup>16</sup> UCC disputes that UHF broadcasters' signal inferiority remains significant, but its argument relies solely on Commission statements in the Prime Time

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<sup>13</sup> See Comments of Paxson Communications Corporation, filed January 2, 2003, at 15-20.

<sup>14</sup> See 1998 Biennial Review at 11078.

<sup>15</sup> See *id.*

<sup>16</sup> Paxson Comments at 15-18



Access Rule and Duopoly proceedings.” Each of these proceedings were resolved before the Commission preserved the UHF discount” and cannot now form the basis for elimination of the discount.

Further, the Commission must continue to recognize that the added expense of constructing and operating UHF stations undermines UHF broadcasters’ competitive position.<sup>19</sup> This gap has not closed in the past three years, and there is nothing on the horizon to indicate that analog UHF stations ever will be operated as cheaply or as effectively as VHF stations. As described in greater detail below, the burden of operating both an analog and digital station during the transition falls especially hard on UHF broadcasters that already pay increased operating costs.

Accordingly, UHF broadcasters must be permitted to take advantage of the economies of scale that the discount makes possible. Allowing large group ownership of UHF stations, and the efficiencies thereby realized, encourages diversity in mass-market programming by promoting the growth of competitive networks. Networks like the WB and UPN rely almost entirely upon UHF stations to distribute their programming, so the health and stability of UHF broadcasters is keenly important to their continued growth.” The growth of the PAXTV network also demonstrates the utility of the rule in

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<sup>17</sup> UCC Comments at 58 (citing Review of the Prime Time Access Rule, § 73.658(k) of the Commission’s Rules, Report and Order, 11 FCC Rcd 546, 583-84 (1995) (“PTAR Order”); Review of the Commission’s Regulations Governing Television Broadcasting, Report and Order, 10 FCC Rcd 4538,4542 (1995)).

<sup>18</sup> Indeed, the Commission even cited one of these Orders in upholding the UHF discount. See 1998 Biennial Review at n.105 (citing PTAR Order, 11 FCC Rcd 546, 583-86).

<sup>19</sup> See 1998 Biennial Review at 11078.

<sup>20</sup> See Paxson Comments at 20.

this regard. The PAXtv network now covers over 87% of the country, enabling Paxson to provide family-oriented mass-market programming that would not be available if Paxson were at the mercy of the established broadcast networks or cable operators who seem chiefly interested in outdoing each other with the level of sex and violence they are willing to inject into their programming.” These examples show that UCC’s myopic argument that the discount undermines diversity cannot be sustained. It is equally important that the Commission preserve a diversity of station owners capable of reaching the mass market as it is that other diverse programming sources be preserved.

In addition to failing to recognize the considerable public benefits produced by the UHF discount, UCC offered no justification for the disruption that would ensue if the Commission eliminated the UHF discount without grandfathering the interests of owners like Paxson, who have pursued innovative and valuable business plans based on the UHF discount.” The entire basis and purpose of the biennial review process is to ensure that the Commission’s ownership rules continue *to* preserve and promote competition, yet UCC makes no effort to address the essentially anti-competitive effects that would be brought about by elimination of the UHF discount without grandfathering. Thus, even if the Commission were to eliminate the UHF discount on a going-forward basis, current ownership interests must be grandfathered with free assignability going forward.

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<sup>21</sup> See Opening Remarks of Commissioner Kevin J. Martin, Family Programming Forum, Annual Conference of National Association of Television Program Executives, January 22, 2003, available at <http://www.fcc.gov/Speeches/Martin/2003/spkjm301.pdf>, at 1, 2.

<sup>2</sup> UCC’s comments further identify several other station owners that would be required to divest their interests if the UHF discount were eliminated. UCC Comments at 49.

**A. NO DEVELOPMENTS SINCE THE 1998 BIENNIAL REVIEW SUPPORT ELIMINATION OF THE UHF DISCOUNT.**

The only relevant change that has occurred since the Commission last upheld the UHF discount is that a greater number of homes now are receiving cable and DBS service. This fact fails to provide any justification for eliminating the discount. Because at least fifteen percent of viewers and thirty percent of televisions still receive television signals over-the-air, this remains an important part of UHF broadcasters' revenue stream, directly and significantly impacting their competitive position. Fifteen percent of viewers and thirty percent of television sets may be a smaller audience than ten or even three years ago, but the dollars those viewers add to stations' advertising revenues represent the difference between profit and **loss** for many stations. Although UHF stations need to be able to reach these viewers, VHF stations, with their stronger signals, still are able to reach more of them. Consequently, UHF stations' inability to reach an over-the-air audience commensurate with their VHF counterparts still impacts their competitive position

UCC relies on the flip side of this equation – the increase in cable and DBS penetration – to justify elimination of the UHF discount.<sup>23</sup> This development has not significantly improved UHF stations' competitive position. Because stations are required to place a good quality signal over cable headends, the must-carry rules do little more than perpetuate the disparity in signal reach that already exists between UHF and VHF stations. Because UHF stations cannot reach as many cable headends in their DMAs with a quality signal, they are forced to either forgo carriage or enter into

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<sup>23</sup> See UCC Comments at 57-58

expensive arrangements for signal delivery. Moreover, as Paxson has detailed in the past, some cable operators actively resist carrying UHF stations in their market, often with the effect of preserving channel capacity for their own affiliated programming.<sup>24</sup> Eliminating the UHF discount and the efficiencies that it provides will only result in fewer station owners capable of resisting these efforts and fewer choices for over-the-air and cable television viewers alike. Reliance on DBS penetration is even more misguided. DBS does not offer local-into-local service in most communities, and such service is all but non-existent in the mid-sized and smaller markets where UHF broadcasters are most handicapped.

**B. THE DTV TRANSITION HAS NOT PROGRESSED SUFFICIENTLY TO JUSTIFY ELIMINATION OF THE UHF DISCOUNT**

The Commission should adhere to the course it charted in the 1998 Biennial Review, when it stated that it would consider the need for the UHF discount again near the close of the DTV transition.<sup>25</sup> The Commission reasoned that reconsidering the UHF discount at the close of the transition would be in the public interest because it believed that the transition would eliminate the UHF-VHF disparity.<sup>26</sup> Although Paxson disagrees with this conclusion,<sup>27</sup> there will be ample time to debate that question when the Commission squarely presents it near the transition's close. At this point, despite the remarkable progress that the transition has made in the last year, even the most optimistic observers recognize that the end of the DTV transition still is years away

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<sup>24</sup> See Reply Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed August 21, 1998, at 5-9 ("Paxson 1998 Biennial Reply Comments").

<sup>25</sup> See 1998 Biennial Review at 11079-80.

<sup>26</sup> See *id.*

Consequently, any reasoning that relies on post-transition conditions to justify elimination of the discount cannot be sustained.

Indeed, for UHF broadcasters, the transition itself is the worst of both worlds, because they are handicapped not only by traditional signal inferiority and the higher costs of station operation, but also by the costs of the transition – including construction costs and the added power expense of operating two stations.<sup>28</sup> Eliminating the discount now based on predictions about post-transition conditions would therefore be not only premature, but in many ways, perverse. The added burdens of the transition require that UHF broadcasters be permitted to continue to realize the efficiencies that the discount permits.

Thus, the FCC must reject UCC's invitation to re-regulate UHF broadcasters at this sensitive point in the DTV transition. The Commission should not even consider *undermining UHF broadcasters' competitive position on the heels of their larger-scale investment in DTV facilities*. To devalue these stations by eliminating the discount at this point in the transition could have calamitous results. The reality is that the UHF-VHF disparity will persist at least so long as broadcasters continue to operate their NTSC stations, and the Commission's rules must take proper account of this fact.

Another important prudential reason for retaining the discount until the close of the transition is the administrative headaches that removal would create. Because the Commission has repeatedly acknowledged the inferiority of UHF stations' reach, it cannot now simply find that UHF and VHF stations have reached technical parity.

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<sup>27</sup> See Paxson Comments at 18-19; Paxson 1998 Biennial Reply Comments at 9-10.

<sup>28</sup> See *id.* at 11078.

Instead, the Commission would have to replace the discount with some system that would calculate the actual coverage of each station.<sup>29</sup> The time and resources this endeavor would require, however, cannot be justified when the end result would be a system that would only be employed for a limited number of years before the close of the transition. Indeed, by the time stations and the Commission could agree about each stations' "actual" coverage, the transition would be near completion, and the same process would need to be undertaken for the DTV universe.

**C. ELIMINATING THE UHF DISCOUNT IS OUTSIDE THE PROPER PURVIEW OF THE BIENNIAL, REVIEW PROCESS.**

Finally, as Paxson pointed out in its Comments, Congress did not create the biennial review process as a vehicle for increasing ownership restrictions on the most vulnerable broadcasters.<sup>30</sup> UCC's proposed elimination of the UHF discount would do precisely that by imposing significant new ownership restrictions on the station owners that can least afford them.

UCC's drive to re-regulate UHF broadcasters flies in the face of what the D.C Circuit has recognized to be the fundamentally deregulatory intent of the biennial review process.<sup>31</sup> To enact such a new restriction, the Commission would be under the doubly heavy burden of justifying a complete policy about-face without any new underlying rationale, and describing the public interest harms that have flown from maintenance of

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<sup>29</sup> See 1998 Biennial Review at 11079.

<sup>30</sup> See Paxson Comments at 21.

<sup>31</sup> See *Fox Television Stations v. FCC*, 280 F.3d 1027, 1033 (2000).

the UHF discount.<sup>32</sup> As Paxson has demonstrated, no such harms exist, and in any case, none have been entered into the record of this proceeding.

### **III. CONCLUSION**

For these reasons, as well as those laid out in Paxson's initial Comments, the Commission should relax its television broadcast ownership restrictions and maintain the UHF discount. No evidence supports continuation of the current national or local ownership restrictions or the newspaper/broadcast or radio/television restrictions. Accordingly, the Commission cannot satisfy the rigorous legal standard imposed by Congress and the D.C. Circuit for justifying these restrictions. Congress and the Courts have commanded deregulation, and now is the time to carry out that order.

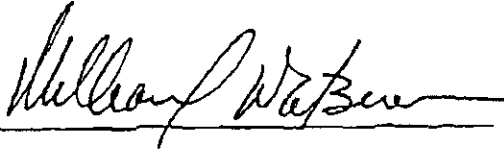
Regardless of the Commission's decision with respect to its ownership restrictions, however, the Commission must reject UCC's call for repeal of the UHF discount and consequent re-regulation of UHF broadcasters. The discount has and continues to partially balance the competitive playing field between UHF and VHF broadcasters. By creating economies of scale that permit UHF station owners to surmount the inherent competitive handicaps of UHF broadcasting, the discount continues to play an important role in making the broadcast industry more competitive. This guarantees better and more diverse services to television viewers, without harm to the public, making the UHF discount the very essence of "necessary in the public

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<sup>32</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending 2-year old rule without reasoned explanation).

interest." In the face of these significant public interest benefits, it would be grossly inappropriate for the Commission to use the deregulatory biennial review process to re-regulate UHF broadcasters.

**PAXSON COMMUNICATIONS CORPORATION**

By: 

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Paxson Communications Corporation  
601 Clearwater Park Road  
West Palm Beach, FL 33401

Dated. February 3, 2003



**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of

2002 Biennial Regulatory Review –	)	
Review of the Commission’s	)	
Broadcast Ownership Rules and	)	MB Docket No. 02-277
Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications	)	
Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations	)	MM Docket No. 01-235
and Newspapers	)	
	)	
Rules and Policies	)	
Concerning Multiple Ownership of	)	MM Docket No. 01-317
Radio Broadcast Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

**COMMENTS OF  
PAXSON COMMUNICATIONS CORPORATION**

Paxson Communications Corporation  
601 Clearwater Park Road  
West Palm Beach, FL 33401

Dated: January 2, 2003

## **SUMMARY**

The Commission must address the new competitive landscape in the video delivery and broadcast industries in a firmly deregulatory, but thoughtful way. Both Congress and the courts have instructed the Commission to remove ownership regulations that are not strictly necessary to the public interest in light of competitive conditions. This mandate must lead the Commission to remove many of its outmoded restrictions, but it must also temper its deregulation with a measure of wisdom.

So, for example, the Commission must increase the national ownership cap. Current competitive forces have rendered the current ownership cap an anti-competitive drag on broadcasters' competitive energies. At the same time, however, the Commission must maintain the UHF discount, because it still provides a realistic measure of the technical and financial obstacles to successful UHF broadcasting. There has been no development in the past two years that could possibly support the abandonment of this important competitive safeguard. The UHF discount remains an important tool in building emerging broadcast networks, as the success of PAXTV has shown. Moreover, the DTV transition has done nothing to alleviate the need for the discount thus far, and it remains too early in the transition to conclude that it ultimately will render the UHF discount unnecessary.

There are areas where the Commission is compelled to move ahead more forcefully. The Commission must immediately remove all restrictions on duopoly ownership in local markets and newspaper/broadcast cross-ownership. Moreover, the Commission must liberalize its radio/television cross-ownership rule, which has no place in a competitive local media environment. None of these rules were well-conceived in

the first place and each has long outlived whatever usefulness it may have had. Like the national ownership cap, these rules merely restrain broadcasters from fairly competing with other media giants, such as vertically integrated cable companies, that face no ownership restrictions of comparable magnitude.

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Rules and Policies	)	
Concerning Multiple Ownership of	)	MM Docket No. 01-317
Radio Broadcast Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

**COMMENTS OF PAXSON COMMUNICATIONS CORPORATION**

Paxson Communications Corporation (“Paxson”) hereby submits these Comments in response to the Commission’s *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup> Paxson urges the Commission to (1) relax significantly the current 35% national broadcast ownership cap and to phase out the cap over the

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<sup>1</sup> 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244, *Notice of Proposed Rule Making*, FCC 02-249 (rel. September 23, 2002) (the “*Ownership NPRM*”). See also FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission’s Ownership Rules, *Public Notice*, DA 02-2476 (rel. October 1, 2002).

next several years; (2) to retain for UHF broadcasters the full benefit of the current UHF discount; (3) to ease the most restrictive elements of its current duopoly policies; (4) to repeal the newspaper/broadcast cross-ownership rule; and (5) to refine the radio/television cross ownership rule. These changes are necessary to modernize the Commission's broadcast ownership rules in light of the current robust competitive media landscape and to bring to consumers the full promise of competition made by Congress through the Telecommunications Act of 1996.

## **I. INTRODUCTION**

As the largest television broadcast station group-owner in America, Paxson is intimately concerned with the important ownership issues raised in this proceeding. Paxson and its subsidiaries own and operate 61 full power analog television stations and 17 low-power and translator stations. Paxson stations have been transitioning to digital aggressively, and 26 Paxson stations are on the air with full-power digital facilities. Paxson has used its many stations to launch the nation's seventh competitive broadcast network, offering family-oriented programming free of the excessive violence, sex, and foul-language common to much of today's broadcast and cable network fare. Paxson is proud to have "proven that money can be made with family friendly programming,"<sup>2</sup> and believes that, if given the chance, the market will demand that large media owners live up to the same standard.

*Paxson long has been a supporter of relaxation of the Commission's ownership rules in the face of the ever-growing competition in the television broadcasting and*

video delivery industries. As Congress recognized in passing the 1996 Telecommunications Act, relaxation of outmoded regulations will stimulate competition and produce media that are responsive to local markets.<sup>3</sup> Paxson participated in the 1998 Biennial Review proceeding, arguing that the Commission should retain the UHF discount, relax its restrictions on duopolies involving stations in separate DMAs, and increase the national ownership cap to 40%.<sup>4</sup> The Commission accepted the former arguments and rejected the latter.<sup>5</sup> Paxson now comes before the Commission to argue in favor of a much more ambitious deregulatory program.

Paxson commends the Commission on its decision to address necessary changes to its broadcast ownership rules in an omnibus proceeding. Logic dictates that

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<sup>2</sup> Remarks Of Commissioner Michael J. Copps To United States Conference Of Catholic Bishops, Dallas, Texas, April 26, 2002, available at <http://www.fcc.gov/speeches/copps/2002/spmjc204.html>.

<sup>3</sup> Section 202(h) of the Telecommunications Act of 1996, requires the Commission to: "review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and . . . determine whether any of such rules are necessary in the public interest as the result of competition . . ." and to " . . . repeal or modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996).

<sup>4</sup> See Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998 ("*Paxson Biennial Comments*"); Reply Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed August 21, 1998.

<sup>5</sup> 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058, 11078-80 (retaining UHF discount), 11072-75 (retaining 35% national ownership cap) ("*1998 Biennial Review*"), *reversed and remanded*, *Fox Television Stations v. FCC*, 280 F.3d 1027 (2000) ("*FOX TV Stations*"), *rehearing granted in part*, 293 F.3d 537 ("*FOX TV Stations Rehearing*"); see also Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12924-29 (1999) (relaxing duopoly rule to allow ownership of stations with overlapping Grade B contours in separate DMAs).



the rules be considered together because each rule impacts the others, and the Commission's goal should be to achieve a logically consistent system of broadcast ownership rules that can stand for years to come.<sup>6</sup> The first step to accomplishing this goal is recognizing the proper frame through which Section 202(h) of the Communications Act requires the Commission to view its ownership regulations. Both the language of 202(h) and its legislative history plainly indicate that Congress expected the Commission to presume that competition and the free market are adequate to ensure that the public interest is served and to retain only those ownership restrictions that can be affirmatively justified as necessary in the public interest either despite existing competition or due to a lack of it.<sup>7</sup>

As the D.C. Circuit has recognized, the Telecommunications Act of 1996 is fundamentally a deregulatory statute.<sup>8</sup> The courts and at least one Commissioner have recognized that the 1996 Act instituted a presumption in favor of relaxation and repeal of media ownership restriction.<sup>9</sup> Indeed, the very language "necessary in the public interest" should be held to require the Commission to discard any rule that cannot be shown to be strictly necessary to the public interest.<sup>10</sup> At the very least, the Commission should be required to announce a plan for easing these rules over time.

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<sup>6</sup> *Ownership NPRM*, ¶ 8.

<sup>7</sup> *See Fox TV Stations*, 280 F.3d at 1048.

<sup>8</sup> *See Id.* at 1033 (" . . . Congress instructed the Commission, **in order to continue the process of deregulation**, to review each of the Commission's ownership rules every two years . . .").

<sup>9</sup> *See Id.* at 1033, 1048; *Ownership NPRM* at 66 (Separate Statement of Commissioner Martin).

<sup>10</sup> *See GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (interpreting "necessary in § 251(c)(6) "collocation of equipment necessary for interconnection" to

Although the Commission has at times appeared to resist this interpretation of the 1996 Act,<sup>11</sup> it is unlikely that any rules founded on a weaker standard will pass muster with the Courts. The Commission has argued, for example, that it is irrational for Congress to require a higher standard for retaining its rules than is required for enacting them.<sup>12</sup> This argument fails, however, because it is perfectly consistent with Congress's deregulatory purpose to isolate a group of regulations (*i.e.* the Commission's ownership rules) and single them out for higher scrutiny. The Commission also has argued that the "necessary in the public interest" language in the 1996 Act is similar to language in the Communications Act of 1934 which has been held to require only the basic public interest rationale.<sup>13</sup> This argument also fails because the 1996 is fundamentally *deregulatory* in nature, whereas the 1934 Act was intended to set the basic framework of communications *regulation*.<sup>14</sup> It is decisive that Congress in Section 202(h) did not require the Commission to review all its rules on a biennial basis and discard those that do not meet the "necessary" standard, but only the ownership regulations. Congress plainly meant for the Commission to undertake a searching review of its ownership regulations and retain only those that are strictly necessary to its mission of protecting the public interest. Because the law is clear and to avoid being right back where it

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mean "indispensable"); *See also Fox TV Rehearing*, 293 F.3d at 540 (declining to determine standard created by Section 202(h)); *Ownership NPRM*, ¶ 18 (requesting comment on court decisions and proper standard to be applied under Section 202(h)).

<sup>11</sup> *See FOX TV Rehearing*, 293 F.3d at 539 (describing Commission argument against strict necessity standard); *see also Ownership NPRM*, ¶ 18 (same).

<sup>12</sup> *See Id.*

<sup>13</sup> *See Id.*

<sup>14</sup> *See Id.* at 539 (describing arguments in favor of strict necessity standard).

started from after another round of rulemaking, appeal, and remand, the Commission should recognize in this proceeding that Section 202(h) requires it to affirmatively justify the public necessity of each of its ownership rules. This stringent standard cannot be satisfied with respect to the ownership rules under review in this proceeding.

**II. THE COMMISSION MUST LIBERALIZE ITS OWNERSHIP RULES, BUT IT SHOULD RETAIN ITS CURRENT SERVICE-SPECIFIC APPROACH AND ITS TRADITIONAL FOCUS ON DIVERSITY, COMPETITION, AND LOCALISM.**

As both Chairman Powell and Commissioner Martin have observed, the broadcast ownership restrictions at issue in this proceeding are old.<sup>15</sup> They are old in the sense that they were enacted a long time ago, and they are old in the sense that they have become antiquated in the face of the tremendous competition existing in local and national media markets today. In their current configuration, the Commission's broadcast ownership rules bear no relation to what is needed to maintain a diverse and competitive media environment. In fact, the rules in their current form work to stifle competition and hinder the full development of the broadcast medium. The Commission must relax these restrictions to allow the full promise of broadcast competition to be realized.

Nonetheless, the Commission's ownership rules have been the fundamental reality of the broadcast industry and the rules have shaped the businesses and plans of every industry participant. It would be unwise to rashly discard any of the existing ownership rules or to attempt to replace them with an as yet undetermined single

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<sup>15</sup> See 1998 Biennial Review, 15 FCC Rcd 11058, 11140 (separate statement of (then) Commissioner Michael K. Powell); *Ownership NPRM* at 66 (separate statement of Commissioner Kevin J. Martin).

ownership rule based on an as yet unexplained market/voice standard.<sup>16</sup> Similarly, it would be an unnecessary strain on the Commission's future resources to commit to case-by-case determinations of multiple ownership questions.<sup>17</sup> The strain on the Commission resources and the delay that such processes would create would all but negate the intended effect of deregulating the broadcast industry.

Instead, the Commission should maintain its basic ownership rule framework, although the rules themselves require significant revision. Specifically, the Commission should continue to observe and study broadcast ownership on both the local and national level to ensure that the policy goals of encouraging diversity, competition, and innovation continue to be satisfied.<sup>18</sup> More importantly, the Commission should continue its practice of maintaining straightforward rules that let industry participants know exactly what the Commission expects.<sup>19</sup> As the Commission moves forward into this deregulatory period, clear rules will be essential to maintaining order in what likely will be a quickly evolving marketplace.

### **III. THE FCC SHOULD LIBERALIZE ALL OF ITS MEDIA OWNERSHIP STANDARDS BUT DO SO BY RETAINING A SERVICE-SPECIFIC APPROACH.**

The Commission requested comment chiefly on the impact that liberalizing its ownership rules will have on its traditional goals of fostering diversity, competition,

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<sup>16</sup> See *Ownership NPRM*, ¶ 73.

<sup>17</sup> See *Id.*

<sup>18</sup> See *Id.*, ¶¶ 29, 65 (describing traditional goals).

<sup>19</sup> See e.g. Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations; 47 C.F.R. §§ 73.1125, 73.3526 and 73.3527, *Memorandum Opinion and Order*, 14 FCC Rcd

localism, and innovation. In Paxson's view, market forces are sufficient to promote these goals and, in any case, are more likely than regulation to achieve them. There has been much debate over the potential negative effects of media consolidation, but the reality of the post-1996 Act has seen a full flowering of competition and media choice.<sup>20</sup> Moreover, the addition of the Internet has added an important competitor for viewers leisure time that is so vast that it could never be monopolized entirely by one or a few firms. Consequently, today the Commission has less reason than ever before to believe that its traditional goals are in danger from consolidated ownership. The Commission therefore has the leisure to consider the most prudent ways to draw down its ownership limitations over the next several years. This Biennial Review should be the first step in that process.

**A. The Commission Should Immediately Increase the National Television Ownership Cap and Set a Schedule for Phasing Out the Rule Over Time.**

The current rule limiting station ownership to reaching 35% of American television homes is the current incarnation of a rule originally enacted in 1941.<sup>21</sup> For the last 61 years, first the rule of five, then of seven, then of twelve, and finally the 35% cap have controlled the growth of national television station group ownership. The question now before the Commission, however, is whether any reason remains to continue to

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11113, 11113, 11117 (1999) (describing Commission goal of promulgating clear rules that are easy to understand and administer).

<sup>20</sup> See, e.g., Jim Rutenberg, *Fewer Media Owners, More Media Choices*, NEW YORK TIMES, December 2, 2002, available at <http://www.nytimes.com/2002/12/02/business/media/02MEDI.html>.

<sup>21</sup> See *Broadcast Services Other than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941).

exercise that control. More specifically, Section 202(h) requires the Commission to decide whether a numerical ownership cap on national broadcast ownership is necessary to promote the Commission's policy goals of competition, diversity, and localism or whether it now is appropriate to allow market forces to achieve these goals free from regulation. Paxson submits that local and national media markets have matured such that continuing the national ownership rules will no longer promote the Commission's goals, but instead will act as an artificial constraint of broadcasters' ability to compete with other media owners that do not face these types of restrictions.

1. The National Ownership Is No Longer Necessary in the Public Interest.

Regardless of how the Commission analyzes the national and local media markets, it must find that diversity and competition have triumphed and a healthy dose of localism continues to be served. A narrow focus on the broadcast television market reveals that consumers have far more choice in terms of both local and national program providers than at any time in the past. There now are 1,714 local broadcast television stations, 568 Class A television stations and 2,127 low power television stations. Each of these stations operates pursuant to a license that requires them to satisfy the Commission's public-interest oriented and local service requirements.<sup>22</sup> The

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<sup>22</sup> See, e.g., 47 C.F.R. §§ 73.670 (children's programming commercial limits), 73.671 (children's educational and informational programming requirements); 73.3526(a)(11) (FCC issues oriented programming requirements). The Commission has requested comment on whether it should replace its ownership rules with additional behavioral regulation governing local broadcasters' operations. *Ownership NPRM*, ¶ 49. Paxson opposes such additional regulation and believes that current regulations are sufficient to guarantee that the needs of local communities are met. Paxson does, however, support the Commission's recent, more aggressive stance toward enforcement of the indecency regulations. Again, however, Paxson believes that the market eventually will eliminate the gratuitous sex, violence, and foul language that characterizes much network

Commission's study of ownership concentration in ten markets nationwide shows that all but one of those markets currently enjoy more broadcast outlets owned by more different broadcasters than at any time in the past.<sup>23</sup> There are now seven competitive broadcast networks even though most viewers still can remember a time when they were lucky to have three network affiliates and an independent UHF channel or two on their television dials.

Just as the three-network home entertainment universe is ancient history, however, a consideration of the national broadcasting ownership cap that takes only the state of the broadcasting industry into account would seem quaint, indeed. The erosion of broadcast television's former hold on television viewers is a much remarked upon phenomenon. Today cable television and direct broadcast satellite television bring consumers so many programming choices that network prime time viewership has declined to just 57% today.<sup>24</sup> Moreover, the Internet, which offers consumers every type of information and commercial shopping opportunity imaginable also has begun to take a central place in a media market that increasingly rewards content providers able to reach ever-smaller fragments of what was once a mass-market audience. Outside the realm of video entertainment, broadcasters face competition for viewers time and interest from traditional media outlets like newspapers, radio, movies, home video, news and entertainment magazines and the old-fashioned but still relevant books.

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programming by turning to alternatives such as PAXTV and other family oriented programmers.

<sup>23</sup> See Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets*, September 2002.

<sup>24</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report*, 17 FCC Rcd 1244, 1282.

Although these diverse media appear to broadcasters as competitors, they appear to consumers as a dizzying array of diverse and high quality entertainment and news choices. In this environment, it is difficult to believe that the Commission could find that either diversity or competition were in danger. That this diversity exists at a time when two broadcast networks currently maintain broadcast holdings that exceed the Commission's current 35% national ownership cap should not be ignored. It is difficult to see exactly what even the most powerful broadcast groups – FOX or Viacom – could do to squelch the diversity of voices and outlets that is challenging them from every direction.

Indeed there is no way to deduce from the current diverse media marketplace that the 35% ownership cap is necessary in the public interest. Even if intuition tells the Commission that increased consolidation is bad for diversity and competition, its experience with the elimination of the national radio ownership limits belies that concern. The Commission's ownership studies show that the elimination of national radio ownership limits has not led to significant declines in diversity at either the local or national level, and has not had any significant negative effect on competition or price in the local and national advertising markets.<sup>25</sup>

Diversity in the video delivery and greater news and entertainment media markets now is at a high enough intensity that the Commission must ask itself whether

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<sup>25</sup> Peter Alexander, *Radio Market Structure and Music Diversity*, Media Bureau Staff Research Paper, September 2002; George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership Format and Finance*, Media Bureau Staff Research Paper, September 2002; Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Media Markets*, Media Bureau Staff Research Paper, September 2002.



the 35% cap isn't artificially hindering broadcasters' ability to compete with media conglomerates like AOL Time Warner, Comcast, and Liberty Media which do not labor under ownership rules that are nearly so restrictive.<sup>26</sup>

This is particularly the case in light of the misrepresentative structure of the ownership cap. As has been pointed out in many contexts, the practice of crediting each broadcast station with all the homes in its DMA vastly overstates the actual reach of each broadcaster.<sup>27</sup> Testifying before Congress in July, 2001, Mel Karmazin of Viacom indicated that stations actually reach, on average, about fifteen percent of their market.<sup>28</sup> Similarly, NBC CEO Bob Wright has noted that even assuming a station reaches all the homes in its market, it is likely being viewed by only about 2-3% of those homes, meaning that a station with a reach of 25% under the FCC's rules, probably reaches no more than 6% of viewers at any given time.<sup>29</sup> Consequently, as the *Ownership NPRM* points out, broadcasters ownership limitations are based on the

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<sup>26</sup> See *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (2001) (reversing and remanding horizontal and vertical national ownership restrictions for cable operators); see also Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, the Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, *Further Notice of Proposed Rulemaking*, 16 FCC Rcd 17312 (2001).

<sup>27</sup> As described in Section B below, even where the UHF discount is employed, actual station reach is still overstated.

<sup>28</sup> See e.g. Hearing of the Senate Commerce, Science, and transportation Committee Regarding Media Concentration, July 17, 2001 (testimony of Mel Karmazin).

<sup>29</sup> Statement Submitted by Lowell "Bud" Paxson, Chairman of Paxson Communications Corporation, for the Record To the Senate Commerce, Science & Transportation Committee Hearing On Broadcast Ownership, July 17, 2001.

demonstrably false premise that broadcasters reach every home in their market while cable ownership limits are based only on homes served.<sup>30</sup> If the ownership cap is maintained at its current level, this disparity will no doubt result in severe market distortions in the long run. The Commission should preempt this problem by increasing the broadcast national ownership cap now.

2. The Commission Should Immediately Raise the Ownership Cap to 50%, Then Increase the Cap by 2.5% Biennially.

Paxson believes that the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission's flexibility to exercise some control if increasing consolidation begins to have ill effects.

Such ill effects are unlikely. The Commission has recognized that consolidation and vertical integration have and are likely to continue to improve the news and entertainment content of the major broadcast networks<sup>31</sup> and that network owned and operated stations tend to program larger amounts of higher quality news and public affairs programming.<sup>32</sup> These findings, coupled with the developments of the deregulated radio industry give the Commission more than enough evidence to

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<sup>30</sup> *Ownership NPRM*, ¶¶ 154-155.

<sup>31</sup> Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programming*, September 2002; Amendment of Section 73.658(g) of the Commission's Rules - The Dual Network Rule, *Report and Order*, 16 FCC Rcd 11114, 11122-23, 11123-24 (2001); Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12930 (1999) ("*Duopoly Order*").

<sup>32</sup> Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programming*, September 2002.

significantly relax the national ownership rule now and set a timetable for further liberalization of the rule.

Accordingly, the Commission should immediately increase the ownership cap to 50%, which will accommodate all existing broadcast combinations and give some additional room for growth. The Commission also should establish a presumption that it will increase the cap by at least 2.5% on a biennial basis until the cap reaches 60%. As part of each biennial review proceeding, the Commission should evaluate developments in the television broadcast and greater media markets and determine whether it should increase the cap more quickly or slowly. Once the cap reaches 60%, the Commission should continue to monitor conditions in the broadcast industry, but without a presumption that additional relaxation of the cap will occur. If conditions remain as strongly competitive as they are now, further relaxation may be in order.

This course is consistent with the Commission's mandate under Section 202(h) because it would embody the Commission's judgement that the current cap is not necessary in the public interest, but that immediately eliminating any cap also is not in the public interest. For the last 60 years, broadcasters have calibrated their business activity against the background of national ownership limitations. They should now be given the opportunity to adjust those plans over time to accommodate the potential changes that unlimited national ownership could bring. Moreover, there are enough potential dangers in relaxing the cap to justify a go-slow approach.<sup>33</sup> Paxson reiterates

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<sup>33</sup> *1998 Biennial Review*, 15 FCC Rcd at 11072-75, *but see FOX TV Stations*, 280 F.3d at 1044 (describing deregulatory message of Section 202(h)); *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 171 (Sentelle, J., concurring and dissenting) ("*Sinclair*") (same).

that it expects increases in the cap to have no ill effects on diversity, competition, or localism. Section 202(h) does not, however, require the Commission to ignore concerns about possible market distortions that could be caused by increased consolidation simply because it cannot demonstrate with certainty that those effects will occur. The course Paxson proposes steers a middle course that is firmly deregulatory, but that will leave the Commission with options if market distortions occur.

**B. Both Law and Logic Dictate that the Commission Retain the UHF Discount.**

Unless the Commission decides to eliminate the national broadcast ownership cap immediately, it must continue to apply the UHF discount.<sup>34</sup> The Commission upheld the UHF discount just two years ago after compiling a full record.<sup>35</sup> The Commission further indicated that it would again review the issue at some point “near the completion of the transition to digital television.”<sup>36</sup> This recent determination continues to be supported by the relevant evidence, and the DTV transition has not yet progressed to the point where additional consideration of eliminating the discount is necessary or warranted.

1. The Commission’s Reasons For Maintaining the UHF Discount Remain Apt.

The Commission elected to maintain the UHF discount chiefly because of the technical inferiority of UHF signals as compared to their VHF counterparts and because

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<sup>34</sup> *Ownership NPRM*, ¶ 130-131.

<sup>35</sup> *1998 Biennial Review*, 15 FCC Rcd 11078-80.

<sup>36</sup> *Id.* at 11080.

of the higher operating costs associated with UHF stations.<sup>37</sup> Nothing has changed in the past two years to undermine those conclusions. As the Commission initially recognized in adopting the UHF discount in 1985, and has consistently affirmed, UHF signal strength declines more rapidly over distance than VHF signal strength. Consequently, UHF stations are unable, by nature, to reach as many viewers as VHF stations. This technical disparity leads to a significant economic disparity, reducing the ability of UHF stations to compete effectively with VHF stations and, potentially, adversely impacting diversity. The UHF discount therefore serves a dual purpose: first, it employs a rough and ready means of estimating the actual reach of UHF stations; and second, it provides an incentive to UHF station owners to acquire additional stations, thereby allowing them to take advantage of the efficiencies associated with group ownership without a pressing concern that they will transgress the national ownership cap. The end result of this rule is more stations, greater diversity, and greater competition. In 1985, there were 365 UHF stations operating in the United states;<sup>38</sup> today that number has grown to 752, a 106% increase.<sup>39</sup>

When the Commission upheld the UHF discount two years ago, it was fully aware of the developments since 1985 that have supposedly alleviated the technical disparity justifying the UHF discount. Specifically, the Commission considered the impact that improvements in television receiver technology and the carriage of UHF

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<sup>37</sup> 1998 *Biennial Review*, 15 FCC Rcd at 11078-79.

<sup>38</sup> See *Broadcasting Cablecasting Yearbook 1985* at A-2.

<sup>39</sup> See Broadcast Station Totals as of September 30, 2002, *Press Release* (rel. November 6, 2002).

stations on cable and DBS systems have had on the continuing need for the discount.<sup>40</sup> It is therefore surprising that the Commission should request additional comment on this point.

Neither gains in receiver technology nor mandatory carriage of UHF signals can improve the signal strength of UHF stations. The fact remains that UHF stations, based on technical disparity alone, do not reach as many viewers with an over-the-air signal as VHF stations. Similarly, the inherent propagation deficiencies and lack of robustness to the UHF signal preclude it from placing a Grade B signal over as many local cable headends as their VHF counterparts, thereby potentially reducing their rights to cable carriage. Consequently, UHF stations' ability to reach both over-the-air and cable viewers in their respective markets is compromised severely.

As the Commission has recognized, UHF stations' inherent technical inferiority is accompanied by built-in economic disadvantages. Given their weaker signal strength and inability to reach as many viewers as VHF stations, UHF stations simply do not garner the same revenues or audience share ratings as their VHF counterparts. Moreover, the costs of operating a UHF station remain high, exceeding the costs incurred by VHF stations, and placing an economic burden on the owners of UHF stations. These operating costs include higher electricity costs generated by UHF stations and the greater cost of UHF antennas that Paxson has detailed in the past.<sup>41</sup> Even the supposed panacea of cable carriage can impose additional costs on UHF

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<sup>40</sup> See *1998 Biennial Review*, 15 FCC Rcd at 11075-77, 11078.

<sup>41</sup> *Paxson Biennial Comments* at 11.

stations forced to provide additional technical support to provide a quality signal to local cable headends to guarantee cable carriage.

2. UHF Technical Inferiority Will Not Be Solved By the Transition to DTV.

These inequities will not be solved by the transition to digital broadcasting. Although the Commission has attempted to ameliorate the UHF/VHF disparity by allowing UHF stations to maximize their service area,<sup>42</sup> stations are permitted to maximize facilities only in theory; in practice, stations in the most congested markets are unable to maximize due to anticipated interference with surrounding stations.<sup>43</sup> If anything, the DTV transition likely will exacerbate UHF deficiencies for the 14% of people and 30% of television sets that still receive service over-the-air, due to the much discussed DTV “cliff-effect.”<sup>44</sup> Whereas viewers of UHF stations’ over-the-air signals may have been willing to put up with minor interference to UHF stations’ analog signals, they will not get that chance with DTV because once a station’s signal strength falls

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<sup>42</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report and Order*, 12 FCC Rcd 14588, 14605-06 (1997).

<sup>43</sup> Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Report and Order, Further Notice of Proposed Rulemaking*, 16 FCC Rcd 5946, 5967 (2001) (describing revised procedures for resolving UHF maximization proposals over 200kW); Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1368-71 (1998) (describing objections to initial Commission decision to limit maximization requests to 200 kW).

<sup>44</sup> See Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, *First Report And Order And Further Notice Of Proposed Rule Rulemaking*, 16 FCC 2598, 2617 & n.131.

below a certain level, viewers are faced with a blue screen that will likely induce them to simply change channels.<sup>45</sup>

3. The UHF Discount Remains Critical to the Development of New Broadcast Networks.

The UHF discount also has produced major public interest benefits by aiding in the emergence of new competitive broadcast networks. Both FOX and PAXTV have been built largely through the acquisition of numerous UHF stations. These networks could not have been constructed had their audience reach been calculated based on the same scale used for VHF stations. After the completion of all pending transactions, Paxson stations, for example, would reach over 63% of U.S. households if Paxson's UHF stations were considered to reach every home in their respective DMAs. With the discount, however, these stations reach only 31.5%, well under the current ownership cap.

PAXTV itself shows the value that the UHF discount has provided to television consumers. PAXTV provides a unique blend of family-friendly programming focused on core American values and free of the explicit sex, senseless violence and foul language that is found in so many television programs today. Launched in 1998, PAXTV now reaches over 87% of the country through its over-the-air broadcast distribution system and through cable and DBS carriage. Thus Paxson has expanded the array of choices available to all television viewers largely because of the flexibility the UHF discount gives station owners.

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<sup>45</sup> See *Id.*



Although other emerging networks such as the WB and UPN have not constructed their networks by acquiring UHF stations, they have nonetheless depended largely on UHF affiliates in the construction of their fledgling distribution networks. Of 73 stations that report WB affiliation, for example, 67 are UHF stations.<sup>46</sup> Similarly, of 110 station that report UPN affiliation, 92 are UHF stations.<sup>47</sup> To the extent that the UHF discount promotes ownership of UHF stations by large group owners capable of providing high-quality non-network fare, the discount promotes the growth of these networks by promoting the growth and strength of their affiliates.

Consequently, retaining the UHF discount is likely to encourage the emergence of a larger number of competitive broadcast networks to join the existing seven. This result is plainly in the public interest, because it increases the diversity of sources and viewpoints in every market the new network reaches. This public benefit will be particularly strong for over-the-air viewers who do not have access to nearly the diversity of voices enjoyed by cable and DBS subscribers.

4. Maintenance of the UHF Discount Satisfies Section 202(h) Because It Is Necessary in the Public Interest.

Given the significant public interests served by the UHF discount, it goes without saying that retention of the discount was necessary under Section 202(h) two years ago, and remains necessary today. There is no substitute for the benefits that the UHF discount has provided to competitive networks in terms of easing the construction of broadcast (and accompanying cable and DBS) distribution outlets. Moreover, because

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<sup>46</sup> See *Industry In Television 2002*, 1st Ed. BIA Financial Network, Inc. (2002).

<sup>47</sup> See *Id.*

the UHF discount was considered fully and reaffirmed only two years ago, the FCC will bear a heavy burden to eliminate it.<sup>48</sup> The Commission reaffirmed this rule in 2000 based on the reasons described above, and has received no information since that could lead it to conclude that its decision was an error or that significant new facts have arisen to justify a change in the rule. Moreover, unlike the other rules at stake in this proceeding, Section 202(h)'s presumption favoring repeal of broadcast ownership limits does not apply here because the UHF discount itself is inherently deregulatory in nature, *i.e.* it is an exception to the general regulation embodied in the national ownership cap.

5. If the Commission Decides to Eliminate the UHF Discount, Basic Principles of Fairness Require Grandfathering of Existing UHF Station Groups.

If, in the face of all this evidence, the Commission still decides to eliminate the UHF discount, Paxson strongly urges the Commission to grandfather all ownership interests existing at the time of its decision which would not comply with the national ownership rule absent the UHF discount. Grandfathering of existing ownership interests not only would be the fairest solution but also would be consistent with established precedent.

As described above, absent the UHF discount, Paxson's ownership interests would exceed the national cap, and would continue to do so unless the Commission

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<sup>48</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending 2-year old rule without reasoned explanation).

raises the cap to over 60%. To require Paxson (and similarly-situated group owners) to divest their interests if the UHF discount is eliminated would be manifestly unfair and not in the public interest. Indeed, failure to grandfather Paxson's interest could lead to the demise of the nation's seventh broadcast network. Neither Paxson nor other group owners should be penalized for their compliance with the FCC's ownership rules at the time those rules were in effect. Although the FCC has in various proceedings discussed whether to retain or modify the UHF discount, it has never suggested that it would require divestitures upon a change in the rule nor has it conditioned the grant of sale applications on the outcome of pending proceedings. Moreover, requiring Paxson to divest a portion of its stations, part and parcel of the PAXTV network, could seriously hamper PAXTV's ability to compete in the network business and to expand its original program offerings.

In the face of changes to its ownership rules, the Commission has in the past grandfathered ownership interests that would not comply with the new rule. In those cases, the Commission concluded that forced divestiture would have consequences adverse to the public interest and therefore should be undertaken only in the most serious circumstances. For example, when the Commission adopted the newspaper/broadcast cross-ownership prohibition in 1975, it required ownership divestitures only in the most "egregious" of cases, recognizing that "stability and continuity of ownership do serve important public purposes."<sup>49</sup> In that proceeding, the

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<sup>49</sup> Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, 1078, 1080 ("1975 Second R & O"), *recon.*

Commission required divestiture only where the commonly-owned newspaper and broadcast interests had a monopoly in a community such that no other radio or television voice could be expected to serve the local community's needs and interests.<sup>50</sup> The Commission reached a similar conclusion in not requiring divestiture of existing radio/television combinations which pre-existed the adoption of the radio/television cross-ownership rule.<sup>51</sup>

The same rationale supports grandfathering of existing ownership interests in the event the Commission eliminates or restricts the UHF discount. The Commission must weigh the diversity and competitive benefits of divestiture against the adverse impact on local stations and network programming. Paxson submits that divestiture of its stations would have no benefit for the public in terms of increased diversity or competition. Of the 1,333 licensed commercial television stations in the United States,<sup>52</sup> Paxson owns only 61, less than 5% of the total number of commercial stations. Notwithstanding this relatively small percentage, Paxson's stations represent an important network programming voice, offering viewers and advertisers a viable and wholesome alternative to other network programming, and contributing to diversity and economic competition in local markets. Forced divestiture would only result in disruption of local programming and service and most likely a discontinuation of PAXTV network programming in local markets. Divestiture also could adversely impact PAXTV as a

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*granted, Memorandum Opinion and Order, 53 FCC 2d 589 (1975), modified, National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977).*

<sup>50</sup> 1975 Second R & O, 50 FCC 2d at 1081-82.

<sup>51</sup> *Id.* at 1054.

<sup>52</sup> See Broadcast Station Totals as of September 30, 2002, *Press Release* (rel. November 6, 2002).

whole. In short, there would be no benefit to the public if Paxson was forced to divest a portion of its owned stations to comply with the national ownership rule.

A decision not to grandfather existing ownership interests also would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy<sup>53</sup>

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.<sup>54</sup> Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally induced, settled expectations of private parties. The Supreme Court has recognized that “[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides ‘an exceedingly persuasive justification.’”<sup>55</sup> The Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.<sup>56</sup>

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements: (1) whether the case is one of first

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<sup>53</sup> See 5 U.S.C. § 551(4)(1994) (emphasis added).

<sup>54</sup> See, e.g., *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass’n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980).

<sup>55</sup> *Heckler v. Matthews*, 465 U.S. 728, 746 (1984) (citation omitted).

<sup>56</sup> Cf. Amendments of Parts 20 and 24 of the Commission’s Rules, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7887 (1996); *CATV of Rockford, Inc., Memorandum Opinion and Order*, 38 FCC 2d 10, 15 (1972) *recon. denied*, 40 FCC 2d 493 (1973).

impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.<sup>57</sup> Any decision by the FCC not to grandfather existing UHF ownership interests cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it has adopted new ownership restrictions.<sup>58</sup> A failure to grandfather existing ownership interests would be a radical and unjustified departure from this longstanding practice. As described above, the Commission would bear a heavy

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<sup>57</sup> See, e.g., *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 11 FCC Rcd 2461, 2464 & n.42 (1995).

<sup>58</sup> See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, *First Report and Order*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); 1975 *Second R & O*, 50 FCC 2d at 1074 (grandfathering broadcast-newspaper cross-ownership); Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, *Memorandum Opinion and Order*, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), *aff'd*, *Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *First Report and Order*, 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions).

burden to justify deviation from such a venerable practice under the Supreme Court's *State Farm* decision and its progeny.<sup>59</sup>

Further, entities that have acquired UHF stations relied on Commission rules permitting the acquisitions based on application of the UHF discount. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive regulation.<sup>60</sup> Here, it would be grossly inequitable for the Commission to require divestiture of stations acquired in good faith and reliance on the regulatory regime.

Retroactive application of a new national ownership rule also would impose significant burdens on UHF stations. Many of Paxson's UHF stations were weaker or newly-constructed when Paxson acquired them. The likelihood is that these stations would be economically devastated if divestiture were required. Under separate ownership, these stations would not have the same access to low-cost, competitive, diverse programming or significant financial resources, both of which are critical for the more vulnerable UHF stations. Forcing Paxson to sell these stations would adversely impact these stations' economic survival and, in turn, their service to the public.

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<sup>59</sup> See *supra*, n. 44.

<sup>60</sup> See, e.g., *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960), *cert denied*, 366 U.S. 908 (1961).

Failure to grandfather existing UHF ownership interests would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests, it also would disserve the public interest in enhanced television service.

### **C. Local Television Ownership Rule**

The rule prohibiting local ownership of multiple television stations was originally enacted in 1964, and now is 38 years old.<sup>61</sup> The rule was liberalized in 1999 to allow ownership where both stations are not in the top four stations in the market and where eight independently owned broadcast stations remain following the duopoly combination (the "top four ranked/eight voices test").<sup>62</sup> The D.C. Circuit remanded this rule to the Commission because the Commission failed to justify the exclusion of other media from its top four ranked/eight voices test.<sup>63</sup> On remand the Commission should eliminate all restrictions on duopoly ownership and leave review of proposed duopolies to case-by-case Commission review and to the Department of Justice's anti-trust division.

#### **1. The Commission Should Eliminate All Restrictions on Duopoly Ownership.**

Although the *Sinclair* court did not strike down the duopoly rule as contrary to the public interest, the Commission now should recognize that current restrictions on duopoly ownership should be eliminated because they are not necessary as required by Section 202(h). Given the great diversity of voices available in every market through

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<sup>61</sup> *Ownership NPRM*, ¶¶ 73-74.

<sup>62</sup> *Ownership NPRM*, ¶ 74.

<sup>63</sup> *Sinclair*, 284 F.3d at 165.



DBS, cable, newspapers, radio, television, and the Internet, the top four ranked/eight voice test is a superfluous safeguard against excessive media concentration in local markets.

The Commission's proposal to remedy this deficiency by developing a new, more comprehensive test of media diversity in local markets is a good example of the cart trying to drive the horse. The market and public demand has produced this diversity of media voices, and there is no reason the Commission should find it necessary to preserve it through *post hoc* regulations. There is no incentive for large station group owners to descend upon communities and extinguish the diversity that currently exists and no evidence that they have the ability or intention to do so. Consequently, a prophylactic rule designed to counter that result cannot be justified as necessary in the public interest.

When the Commission takes a comprehensive view of local media markets, it must find that the top four ranked stations part of its duopoly rules must be eliminated. This test was never well conceived because it doesn't actually promote or preserve diversity, but rather acts as a *de facto* cap on any station group owner's local household reach akin to the national ownership reach cap discussed above. Accordingly, this part of the rule cannot be justified even under the *Sinclair* court's blessing of the duopoly rule's function in preserving diversity.<sup>64</sup> A combination of the top two stations in a market will not lead to any fewer media voices in a market than a combination of the first and fifth ranked stations in that market. Moreover, it is far from clear that the top

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<sup>64</sup> See *Sinclair*, 284 F.3d at 160.

four ranked test is necessary to protect competition for advertising dollars in local television markets. So long as multiple network-affiliated stations exist in a market, it is unlikely that a group owner even of the top two stations in a market would be capable of exercising market power in a local television advertising market. Accordingly, the top four ranked stations test cannot be shown to further the public interest, let alone to be necessary to do so.

Similarly, the eight voices test is flawed and should be eliminated. A comprehensive view of the available local media voices shows that regardless of the duopoly rules, a significant number of media voices will be available. The Commission developed the eight voices test to balance the benefits of duopoly ownership versus the loss of diversity thereby caused.<sup>65</sup> When the Commission views the diversity of voices available in every local media market, however, it must make a more compelling justification for denying the benefits of duopoly ownership to Americans unfortunate enough to live in small DMAs. Indeed, people in the smaller DMAs would likely benefit more from the increase in programming quality offered by duopolized stations.

Competition in local markets will be adequately safeguarded by case-by-case Commission and Department of Justice review of proposed station combinations that involve top four stations or markets that will be left with fewer than eight independently owned television stations following the duopoly combination. The Commission will not be required to approve transactions that create duopolies that would transgress the current rule, and would be free to intervene if a particular transaction appeared to

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<sup>65</sup> *Duopoly Order*, 14 FCC Rcd at 12910-11.

threaten local diversity or competition. Given the ability of two federal agencies to control excessive consolidation on a case-by-case basis, the Commission cannot show that a prophylactic rule like the top four ranked/eight voices test is necessary in the public interest.

Instead, the Commission should allow unrestricted duopoly ownership regardless of station ranking or market size. As the Commission gains experience with unrestricted duopolies, the Commission may find it necessary to develop a test akin to its "50/70" screening rule it uses in the local radio context.<sup>66</sup> Conversely, if, after five years of unrestricted duopoly ownership, the market continues to produce current levels of diversity and competition, the Commission should begin exploring whether triopolies should be permitted.

2. Alternatively, NAB's "10/10 Rule" Would Provide Needed Relief to Small and Mid-Size Market Broadcasters.

If the Commission believes that an immediate transition to unrestricted duopoly ownership is imprudent, NAB's proposed "10/10 Rule" would be a reasonable transitional rule.<sup>67</sup> As Paxson understands it, the "10/10 Rule" would replace the eight-voices test with a presumption that any common ownership of multiple local stations would be acceptable – regardless of the number of voices in the market – if it involved two stations with audience shares of less than 10 or if it involved one station with a share of more than 10 and a second station with a share of 10 or less. Additionally,

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<sup>66</sup> See, e.g., *Great Empire Broadcasting, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 11145, 11149 (1999) ("*Great Empire Broadcasting*").

<sup>67</sup> See Comments of the National Association of Broadcasters, MB Docket Nos. 01-235, 02-277; MM Docket Nos. 02-244, 01-317, filed January 2, 2003.

station combinations that fail to meet this standard still would be entitled to case-by-case consideration of non-conforming applications, such as proposed triopolies.

If the Commission determines that its diversity goals require retention of some form of duopoly rule, NAB's proposal has much to recommend it. If the Commission chooses to follow this approach, it should carefully spell out what types of non-"10/10" arrangements will be most likely to receive favorable treatment. NAB suggests that the Commission retain its current preferences regarding duopoly waivers involving failed, failing, and unbuilt stations, and suggests that financial hardship associated with the DTV transition and the maintenance of local news operations should also be the basis for a waiver. Paxson agrees. The Commission should use the tools it has available to promote viable and robust stations at the local level, a swift DTV transition, and diverse programming serving local needs. To the extent that exceptions to any remaining duopoly rules serve these goals, the Commission should make those exceptions.

Short of elimination of the local television ownership restrictions, NAB's proposed "10/10 Rule," coupled with the reasonable waiver standard just described, would create the best set of probable outcomes. Although it may be preferable to the Commission's diversity goals to have the maximum number of different owners in each market, two separately-owned weak stations incapable of properly serving their communities' needs should be replaced, where possible by commonly owned duopolies. This result will maximize the benefits of local broadcasting, particularly to small and mid-sized communities, without compromising the Commission's policy goals.

**D. The Newspaper Broadcast Cross-Ownership Rule Should Be Completely Repealed**

Complete repeal of the newspaper/broadcast cross-ownership rule is long overdue. The Commission requested additional comment on this rule to the extent that comment on the other rules under review in this proceeding require it.<sup>68</sup> The only additional comment necessary, however, is that the Commission should delay no longer the repeal of this outmoded rule. The Commission already is in possession of a voluminous and detailed record that provides ample evidence that the newspaper/broadcast cross-ownership rule is contrary to the public interest, and accordingly, should dispose of the rule with due haste.

In brief, the record in Docket No. 01-235 reveals no evidence sufficient to enable the newspaper/broadcast cross-ownership rule to withstand scrutiny under Section 202(h). The newspaper/broadcast cross ownership rule clearly is not “necessary” in the public interest. All available evidence from markets containing grandfathered combinations indicates that the public is being richly served by a diverse and competitive array of local and national media voices. Indeed, all the relevant evidence suggests that this rule could not even satisfy a less rigorous standard than that laid out by Section 202(h), because it does not appear that the rule remains even arguably in the public interest.

The Commission adopted the newspaper/broadcast cross-ownership rule nearly twenty-eight years ago, frankly admitting that the rule was not designed to combat any particularized threat to the public interest, but rather to maximize diversity of local media

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<sup>68</sup> *Ownership NPRM*, ¶ 7.

markets.<sup>69</sup> The Communications Act, however, no longer allows the Commission to override the benefits of free competition in the service of speculative goals that do not remedy any harm to the public interest. Moreover, the development of the newspaper and local broadcast industries has revealed that ownership restraints are more likely to impair than to increase diversity in local service.

As with its other broadcast ownership rules, it is time for the Commission to loose the chains of competition and allow the benefits to flow. Equally important, elimination of the blanket cross-ownership ban need not result in abdication of the Commission's oversight role over local media combinations. Instead, elimination of the ban will result only in a return to the *status quo ante* that proceeded the current rule. Both the Commission and the DOJ will be free to examine individual newspaper/broadcast combinations to ensure that local diversity and competition remain robust. Although this result may lead to a slightly greater expenditure of resources over time, it is the only approach supported by the record evidence in this proceeding.

#### **E. Radio-Television Cross-Ownership Rule**

The original radio/television cross ownership rule, which prohibited ownership of television and radio stations with overlapping service contours, now is thirty-two years old.<sup>70</sup> In 1999, however, the Commission relaxed this rule to permit common ownership of at least one radio and one television station in each market, with additional television

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<sup>69</sup> 1975 *Second R&O*, 50 FCC 2d at 1048-49, 1049-50, 1079-84 (1975).

<sup>70</sup> Amendment of Section 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), *recon. granted in part*, 28 F.C.C.2d 662 (1971).

and radio station ownership permitted in larger markets.<sup>71</sup> Even this relaxed rule, however, cannot be adjudged necessary in the public interest and must be liberalized.

As with the national television ownership cap and the duopoly rule, the current radio/television ownership rule involves the Commission in the worst sort of speculative market engineering. The rule is based on the proposition that the market will not demand viewpoint or content diversity or localism and that the Commission must ensure achievement of these goals through prophylactic ownership regulations that ensure a certain number of separate media owners in each market. As described above, this proposition is both logically flawed and contradicted by the evidence already in this proceeding. The market will demand localism and it is just good business to provide it.<sup>72</sup> Moreover, mid-sized and large multi-media market participants will be more likely to have the resources and risk capital necessary to provide diverse programming to niche markets than will smaller operators.

In addition, there is no special characteristic of the position of radio and television in local media markets that justifies special restrictions on ownership of both. The duopoly rules already control excessive concentration in broadcast television ownership and the local radio ownership rules already protect against that harm in the radio context. Obviously, any radio television combination that violates either of these rules should be forbidden. Beyond that, however, the Commission bears the heavy burden of satisfying Section 202(h)'s "necessity" standard in justifying further restrictions.

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<sup>71</sup> *Ownership NPRM*, ¶ 99.¶

<sup>72</sup> See e.g. Hearing of the Senate Commerce, Science, and transportation Committee Regarding Media Concentration, July 17, 2001 (testimony of Mel Karmazin).

With this in mind, the Commission can concentrate on adjusting its radio/television cross-ownership rule to safeguard only the most egregious cases of market concentration that will not be prohibited by the Commission's other ownership rules. The simplest approach to this potential harm is to utilize a modified version of the 50% screening mechanism the Commission uses to flag radio transactions that may create excessive concentration.<sup>73</sup> Under this arrangement, transactions involving the creation of a radio/television combination that would control 50% or more of the combined television and radio advertising revenue in given DMA would be subject to heightened scrutiny.

In the case of radio/television combinations, the DMA is the appropriate market in which to gauge concentration of advertising revenue because it dovetails with the geographic scope of the duopoly rules. Although many, if not most, radio stations will not place a service-grade contour over the entirety of the DMA in which it is located, television/radio combinations are likely to be constructed to cover as much of a DMA as possible to take maximum advantage of the efficiencies created by the overlapping service areas of the radio and television stations.

This screening approach will eliminate the potentially arbitrary results that application of the current rules could create. By using a revenue basis to trigger increased scrutiny rather than a station number or independent voice test, the Commission will get to the heart of any given television/radio combination's potential

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<sup>73</sup> See, e.g., *The Application of Voice in the Wilderness Broadcasting, Inc., Hearing Designation Order*, MB Docket No. 02-272, FCC 02-246 (rel. September 05, 2002); *Great Empire Broadcasting* 14 FCC Rcd at 11148. See also Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).



market power in the broadcast advertising market. Moreover, the Commission already has experience in assessing the likelihood of competitive harm that a combination controlling 50% or more of a market's advertising revenue could cause through its application of the screening mechanism in the radio context.

## **CONCLUSION**

Paxson commends the Commission on its efforts to undertake a comprehensive review of its rapidly aging broadcast ownership rules. Paxson also understands the Commission's desire to "think outside the box" to achieve unified and consistent broadcast ownership rules. In this case, however, *all that is necessary to satisfy Congress's goals and 202(h) of the Communications Act is the adjustments to the rules suggested herein.* An immediate increase in the national ownership cap followed by a slow phase-out of the rule will allow the Commission to comply with the D.C. Circuit's orders while maintaining a contingency if excessive concentration begins to damage the public interest. Retention of the UHF discount will allow the Commission to continue to foster the birth of competitive television broadcast networks while taking due note of the physical limitations of UHF signals and the economic challenges those limitations create. Liberalization of the duopoly rules is the logical next deregulatory step given the *lack of any negative market effects created by the current rules.* Finally, elimination of the television/newspaper and television/radio cross ownership rules will remove arbitrary ownership limitations that do little other than prohibit broadcasters from realizing the economies inherent in multi-media operations while depriving the public of the improved programming product *that those efficiencies would make possible.* Each of these changes would have the effect of placing market forces and competition, rather

than government regulation, in its proper place as the prime regulator of local media.  
Section 202(h) of the Communications Act and the public interest demand no less.

Respectfully Submitted,

**PAXSON COMMUNICATIONS CORPORATION**

By: /s/ William L. Watson  
William L. Watson  
Paxson Communications Corporation  
601 Clearwater Park Road  
West Palm Beach, FL 33401

Dated: January 2, 2003

**UHF DISCOUNT**

**RECORD SUBMISSIONS**

**OF**

**CAPITOL BROADCASTING**

Capitol Broadcasting Company, Inc., 2619 Western Blvd., P.O. Box 12000, Raleigh, NC 27605

DIANNE SMITH  
Special Projects Counsel  
(919) 821-8933  
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May 8, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

RE: EX PARTE NOTICE - MB Docket No. 02-277, MM Docket No. 01-235, 01-317,  
00-244

Dear Ms. Dortch:

On May 7, 2003, on behalf of Capitol Broadcasting Company, Inc., I met with Jordan Goldstein of Commissioner Michael Copps' office regarding the UHF discount and other general matters related to the above proceedings.

If there are questions relating to this filing, please contact the undersigned.

Best regards,

/s/ Dianne Smith

Dianne Smith  
Special Projects Counsel

Capitol Broadcasting Company, Inc., 2619 Western Blvd., P.O. Box 12000, Raleigh, NC 27605

JIM GOODMON  
President & CEO  
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April 24, 2003

VIA FACSIMILE

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, DC 20554

RE: 2002 Biennial Review - Review of the Commission's Broadcast  
Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the  
Telecommunications Act of 1996 (MB Docket No. 02-277) and Related  
Proceedings (MM Docket No. 01-235, MM Docket No. 01-317, MM  
Docket No. 00-244)

Dear Chairman Powell:

On behalf of Capitol Broadcasting Company, Inc. (CBC) and as its third generation  
chief executive officer, I write to you with immense concern for the public and for the  
broadcasting community.

This has been a week of mixed emotions. First, it was with great pride that we filed  
comments in the digital television proceeding on Monday. Second, on Tuesday, it was with  
confusion and alarm that I read the letter to you from Robert Decherd of Belo Corp. (*See  
Appendix A.*)

The most disturbing line occurs when Mr. Decherd suggests raising the national  
television cap to 45% "in return for favorable Commission action on the 'right to reject' and  
affiliation agreement assignability matters raised in the pending NASA petition." I am  
perplexed. What does this mean? I am not a lawyer, but aren't these separate issues?  
Doesn't each need to be reviewed on its own merits or is this "let's make a deal?" I mean no  
disrespect to Mr. Decherd, you, or the Commission, but this ownership review will change  
what citizens in every community in America receive on their local news, sports, weather,  
and public affairs programs, as well as how they receive it, and it will determine the kind of  
national network programming that ultimately is available in their homes. This debate  
should not take place with deal making and concessions between a few major media  
companies and a government agency with appointed, not elected, officials.

During the course of this proceeding, a number of other occurrences have stunned,  
bewildered, disappointed, and disturbed me, including: the total disregard of the impact of  
the digital transition on these rules; the lack of discussion about the UHF discount, resulting  
in our current 35% cap actually being a 70% cap with one group owner already reaching

Page 2

The Honorable Michael K. Powell

April 24, 2003

over 61% of the nation's TV households; the mandatory June 2<sup>nd</sup> rush to judgment date; the reliance on twelve arguably incomplete surveys; the focus on corporate economic interests, with a general disrespect for the public interest, and on nationalism, not localism; the stringent reading of a court case that three times expresses that the court leaves room for the Commission to justify the national cap rule; and the disregard of the public's overwhelming opposition to relaxing the rules.

We at CBC support the public. We believe that more voices are better. We are not willing to trade or compromise the public's future interest for concessions that may benefit us financially.

We have listened to the public – the message is clear – preserve localism and diversity in ownership.

Best regards,

/s/ James F. Goodman

James F. Goodman

cc:

The Honorable Kathleen Q. Abernathy

The Honorable Michael J. Copps

The Honorable Kevin J. Martin

The Honorable Jonathan S. Adelstein

W. Kenneth Ferree, Chief of the Media Bureau

U.S. Congress:

Members of the Senate Commerce, Science and Transportation Committee (via hand delivery)

Members of the House Energy and Commerce Committee (via hand delivery)

Nancy Victory, Assistant Secretary, Department of Commerce and National

Telecommunications and Information Administration

EX PARTE OR LATE FILED

Before  
Federal Communications Commission  
Durham, North Carolina

Testimony of  
James F. Goodman  
On Media Concentration

March 31, 2003

ORIGINAL

RECEIVED

APR - 9 2003

Federal Communications Commission  
Office of the Secretary

MB Docket  
02-277  
01-235  
01-317  
00-244

Welcome to North Carolina and the Research Triangle Area. I am Jim Goodman, President and Chief Executive Officer of Capitol Broadcasting Company, Inc., which owns and operates five television stations and one radio station here in North Carolina. I am the third generation president of Capitol Broadcasting, and I am proud that my son, Jimmy, represents the fourth generation... (grandson Michael would be working with me if it did not violate the child labor laws . . . he is 5 ...)

Broadcast technology has changed and there are many NATIONAL cable and satellite channels>>> but one thing is unchanged >>> granting broadcast licenses in the public interest and allocating them by local community with the goal of *localism* remains the law of the land. *No technology, marketplace changes, statutes, agency regulations or court cases have supplanted, repealed, or vacated localism. Localism is as necessary to the public interest* today as it was in 1937 when we received our first broadcast license. Through *localism*, we reflect the standards of our individual communities – Raleigh-Durham, Charlotte and Wilmington.

Today localism and, in turn, community standards are under direct fire from those advocating nationalism and comorate objectives. I am here today to respectfully urge the Commission to retain the national television ownership cap and revise the rules as to how

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stations ~~are~~ counted toward the cap. Based on the fact that more owners provide more diverse voices and real local competition, I also urge the Commission to retain the radio/TV cross-ownership and newspaperbroadcast cross-ownership rules and to study the impact of duopolies and radio consolidation on local communities.

\* \* \* \* \*

Maintaining (*or even reducing*) the national 35% ownership cap is **essential** to localism. If the cap is increased, one thing is certain – we will see the giant conglomerates and their investment bankers lead a flurry of buying and selling. Billions will change hands... Remember that deregulation reduced the number of radio station owners by almost one-third. Will television experience the same? What about our **local** communities? What about localism? I don't have a crystal ball; but let's look at what we already know.

- **First, there is NO adequate substitute for local broadcast television.**

Broadcast television is a different medium – we are different from cable and satellite ...

#1 Broadcasting (unlike cable and satellite) is free and thus available to the nation's poorest and the nation's richest whether on a 13-inch black and white or a 56-inch HD set.

#2 Broadcasting is the primary source for local emergency news and weather information.

#3 Broadcasting is uniquely local with licenses granted by local community.



#4 Broadcasters are actually trustees of the public airwaves – we **are** required by law to serve our local community and to operate our stations in the public interest.

The deregulation advocates argue that because there are hundreds of national cable channels and hundreds of national satellite channels and thousands of national internet sites that the broadcast ownership rules are antiquated... they say that the marketplace has changed. But has it? Not really..

*The national cable and satellite networks are not a substitute for local broadcasting...*

Local channels remain the dominant medium in the marketplace, because there is no adequate substitute for local television. The public votes with the ratings, and localism is still winning in the polls. And although there **are** new media outlets since my grandfather's day, the voices in the market **are** actually the **same** voices with the broadcast networks owning *three* of the four most popular cable news channels and many of the top Internet sites.

- **Second, current media consolidation is ALREADY undermining localism and the evaluation of community standards.**

Localism and the reflection of community standards **are indispensable** components of the public interest, which remains the foundation of broadcasting law. As the networks and other large groups have been allowed to own more and more local stations, the local voice has become a long distance call and community standards have been replaced with corporate economic efficiencies. Of particular concern is the ownership of local stations by the networks. Network owned television stations carry the programs they are ordered to carry by

the network...there is no local decision-making involved. *If the fox owns the henhouse, what prevents the fox from ravaging the hens?*

I would like to quickly tell you about our local FOX affiliate...WRAZ. At WRAZ, we decided that we would draw the line on reality programming when the show demeaned marriage and/or family. We therefore did not broadcast, "Who Wants to Marry a Millionaire?" and Married By America...we did not broadcast those programs because it was our editorial opinion that these shows did not reflect the standards of our *local* community. I am not saying here that we made the right decision...just that we made a decision. Most network programming is aired without preview by local stations. The right to reject or preempt network programming is a right we take seriously.

*If the fox owns the hen, can the hen redly reject the fox?*

Other specific attacks on localism resulting from media consolidation include central casting, plug and play local news and group programming – all decisions made at the corporate level, often hundreds of miles from the local market, and reflecting corporate policy, not public policy.

- **Third, media consolidation is also affecting the ability of local station owners and small groups to compete.**

The network and large group owners' negotiating leverage for syndicated programming and satellite and cable multichannel retransmission severely impacts the small owner. Twice recently we have been unable to bid for popular syndicated programming because a group had purchased it for all of its markets. We ask the Commission to assess whether a vertically integrated syndicated programming provider should be required to offer its programming on a market-

by-market bid basis. We also ask the Commission to look at the tying arrangements related to multichannel negotiations with cable owners by the networks.

Finally, we ask the Commission to eliminate the UHF 50% discount and to count duopolies. There is no longer a valid reason for the discount. Today's 35% caps is really a 70% cap...and remember that, more than 95% of all digital licenses are UHF. We urge the Commission to change this rule immediately.

As I stated in my opening remarks, no technology, marketplace changes, statutes, agency regulations or court cases have supplanted, repealed, or vacated localism. Congress **and** the Courts each continue to recognize the importance of localism. No one is suggesting that we change the method of granting and allocating licenses in the public interest and by local community. And when the DC Circuit remanded the national ownership rule to the Commission, it stated, "[I]n sum, we cannot say it is unlikely the Commission will be able to justify a future decision to retain the rule."

Commissioners, the future is here. Act in the name of localism. Preserve the ability of local broadcast companies, like Capitol, to still be serving our communities when my five-year old grandson assumes my title.

Thank you for allowing me to testify today.



COVERAGE YOU CAN COUNT ON

April 2, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

RE: **EX PARTE NOTICE** – Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television (MB 03-15& RM 9832); In the Matter of Digital Must Carry (CS 98-120); 2002 Biennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (MB 02-277)

Dear Ms. Dortch:

On March 31, 2003, on behalf of Capitol Broadcasting Co., Inc., WRAL-TV and WRAL-DT, Jim Goodmon, John Greene, Chuck deCourt, Tom Beauchamp, and I met with Commissioner Michael J. Copps here in Raleigh, North Carolina. We discussed issues related to the digital transition, demonstrated how WRAL-DT is using its digital spectrum, and gave the Commissioner a tour of our digital facility. We also had some discussions regarding the Commission's Notice of Proposed Rulemaking related to ownership issues, particularly the 35% cap and the counting of UHF stations in connection with the 35% calculation.

If there are questions related to this filing, please contact the undersigned.

All the best,

Capitol Broadcasting Company, Inc.

/s/ Dianne Smith

Dianne Smith  
Special Projects Counsel



A CBS affiliate

Receptionist Phone: 919.821.8555

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Miami	West Palm Beach

March 6, 2003

**MARVIN ROSENBERG**  
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### VIA ELECTRONIC FILING

Marlene H. Dortch, Esquire  
Secretary  
Federal Communications Commission  
The Portals, 445 Twelfth Street, SW  
Room TW-A325  
Washington, DC 20554

Re: EX PARTE NOTICE

In the Matter of 2002 Biennial Regulatory Review – Review of  
the Commission's Broadcast Ownership Rules and Other Rules  
Adopted Pursuant to Section 202 of the Telecommunications Act  
of 1996, MB Docket No. 02-277

Cross-Ownership of Broadcast Stations and Newspapers, MM  
Docket No. 01-235

Rules and Policies Concerning Multiple Ownership of Radio  
Broadcast Stations in Local Markets, MM Docket No. 01-317

Definition of Local Markets, MM Docket No. 00-244

Dear Ms. Dortch:

On March 6, 2003, on behalf of Capitol Broadcasting Company, Inc., Jim  
Goodmon, Dianne Smith and I met with Commissioner Kevin J. Martin and his  
Legal Adviser on Media Issues, Catherine Crutcher Bohigan, Commissioner

Jonathan S. Adelstein and his Interim Adviser for Media Issues, Sarah Whitesell, and members of the Commission's Ownership Task Force, Robert H. Ratcliffe, Mania Baghdadi, Royce Sherlock, Timothy May, Judith Herman, Marcia Glauberman, and Jamila Bess-Johnson. The focus of the discussion was the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding, in particular the 35% cap and the counting of UHF stations in connection with the 35% calculation.

In the event that there are any questions concerning this matter, please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP

/s/ Marvin Rosenberg

Marvin Rosenberg

Counsel for Capitol Broadcasting Company

cc: Jim Goodmon  
Dianne Smith

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